FORWARD

There were five separate trials and appeals. The opinion of the Court of Appeals for the Seventh Circuit filed on November 30, 1971 covered all five cases and was set forth in full in the Petition for Writ of Certiorari. It is not being reprinted in the Appendix. The Judgment of the Court of Appeals follows the Index on page -v-. The Order Granting Certiorari appears on page -vi-.

The pertinent portion of the record in each case before the trial court are set forth individually as to case. The Index covers all five cases and their records.

All pages of the Appendix excepting the Forward, Index, Judgment of the Court of Appeals, Order Granting Certiorari and Title pages were photographically reproduced

from the same pages in the original Appendix in each case before the Court of Appeals. Numerals on the left side of certain pages refer to the original transcrip of the record filed with the Court of Appeals.

*** *** *** ***

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JUDGMENT OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	)	Numbers
	)	18761
vs	)	18762
	)	18764
PAUL P. ERLENBAUGH, et al Defendants-Appellants	)	18765
	)	71-1140

November 30, 1971

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgments of the said District Court in this cause appealed from be, and the same are hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

ORDER GRANTING CERTIORARI

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1971

ERLENBAUGH, ET AL PETITIONERS	)	
vs	)	No. 71-839
UNITED STATES OF AMERICA RESPONDENT	)	

The Clerk of the Court by letter dat
March 6, 1972 advised that the Court on t
date entered the following order in capti
ed case:

"The petition for a writ of certiora
granted limited to Question 1, presen
by the petition, which reads as follo

'1. Whether the Court of Appeals erred
in not following the opinion of the Cour
of Appeals for the Fourth Circuit in a
1967 case entitled U.S. vs Arnold, 380
Federal 2nd, 366, thus creating a confli
between the circuits.'

Mr. Justice White took no part in the
consideration or decision of this
petition."

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 35
PAUL P. ERLENBAUGH, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 35)
DOCKET ENTRIES

4-10-69 Indictment filed. Praecipe for warrant filed. Warrants iss. and forw. to Marshal.

5- 9-69 Defendants, Paul P. Erlenbaugh and William H. Mitchell, present in court with counsel, Max Cohen. Defendants arraigned and plead NOT GUILTY to all counts. (Defendants request trial by jury. Defendants request time to file motion addressed to the indictment. Request granted. Defendants to file motion on or before May 23, 1969.

5- 9-69 Defendant, John C. Hintz, present in court with counsel, Theodore Puchowski. Defendant arraigned and plead NOT GUILTY to all Counts. Defendant requests trial by jury. Defendant requests time to file motion to indictment. Request granted to May 23, 1969.

6- 5-69 Defendants, Paul P. Erlenbaugh and William H. Mitchell, file Motion to Dismiss;

6- 5-69 Motion for Issuance of Subpoena Duces Tecum;

6- 5-69 Motion to Suppress;

6- 5-69 Memorandum in Support of Motion to Dismiss, Motion for Issuance of Subpoena Duces Tecum and Motion to Suppress; and

6- 5-69 Certificate of Service.

Docket Entries

6- 6-69 Defendant, John C. Hintz, files Motion to Dismiss; Motion for Issuance of Subpoena Duces Tecum; Motion to Suppress; and Memorandum in Support thereof.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is DENIED. (SE) BEAMER:J. (copies to counsel). Memorandum attached thereto.

6-29-70 Cause for trial. Government represented by J. Frank Kimbrough, Asst. U. S. Attorney. Defendants, Paul P. Erlenbaugh and William H. Mitchell, present with counsel, Max Cohen. Defendant, John C. Hintz, present with counsel, Ted Puchowski. Jurors sworn voir dire. Jury examined, selected accepted and sworn to try the cause: 1. Ethel Singer 2. Barlow Palmer 3. Josephine Mikuly 4. Mabel Brown 5. Shirley L. Dault 6. Lois Elaine Reiner 7. Theodore R. Lucas 8. Joseph Bonner 9. William Roach 10. Wm. C. McIntosh, Sr. 11. Leo Posiadlowski 12. Bernice Jasek Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants defer presentation of opening statement. Government presents evidence but does not conclude. Cause continued until Tues., June 30, 1970, at 9:30 a.m.

6-30-70 Trial resumed. Government presents further evidence, but does not conclude. Cause continued until Wednesday, July 1, 1970, at 9:30 a.m.

7- 1-70 Trial resumed. Government presents further evidence, concludes and rests. Defendants move for judgment of acquittal. Arguments heard. Motion denied as to Counts I, II and III. Motion granted as to Count IV. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, present opening statement. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, present evidence, conclude and rest. Defendant, John C. Hintz, presents evidence, concludes and rests. Government presents rebuttal, concludes and rests. Both sides rest. Government presents closing argument. Defendants, Paul P. Erlenbaugh and Wm. H. Mitchell, presents closing argument. Defendant John C. Hintz, presents closing argument. Government presents final argument. Court tenders instructions 1 through 31 and gives all. Government tenders instructions 1 - 8. 1 and 7 are given as modified; all others refused. Defendants tender 1 - 17; 5 given as modified; all others refused. Court instructs jury. 5:33 p.m. Bailiff sworn. Jury retires to commence deliberation 5:35 p.m. Jury called back for further instructions. U. S. Marshal authorized to provide meal for jury. 8:25 p.m. Jury returns the following verdicts:

"We, the Jury, find the defendant, Paul P. Erlenbaugh, guilty as charged." signed—Theodore R. Lucas, Foreman

"We, the Jury, find the defendant, William H. Mitchell, Guilty on Count I, II and III." signed—Theodore R. Lucas, Foreman

"We, the Jury, find the defendant, John C. Hintz, Guilty on Count I, II and III." signed —Theodore R. Lucas, Foreman
Verdicts filed. Beamer-Yates.

8- 7-70 Defendant, William H. Mitchell, present in court with counsel, Max Cohen. Defendant sentenced: 2 yrs. impr. suspended, probation 3 years on each of Counts 1, 2 and 3, to run concurrently. Judgment and Order of Probation issued. (SE) Beamer:J

8- 7-70 Defendant, John C. Hintz, present in court with counsel, Theodore Puchowski. Defendant sentenced: 2 yrs. impr. suspended, probation 3 yrs. on each of Counts 1, 2 and 3, to run concurrently. Said sentence to run concurrently with sentence in 69 H CR 37. Judgment and Order of Probation issued. (SE) Beamer:J

8- 7-70 Defendant, Paul P. Erlenbaugh, present in court counsel, Max Cohen. Defendant sentenced: 2 yrs., 6 months to be served, remaining 1½ yrs. suspended and deft. placed on probation for 3 yrs. upon release. Stay of execution granted until Aug. 14, 1970, at 9:00 a.m. Judgment and Commitment issued. (SE) Beamer:J
Defendants to remain on bond previously filed pending appeal.

8-12-70 Defendants, Paul P. Erlenbaugh, William H. Mitchell, and John C. Hintz, file Notice of Appeal.

9-21-70 Court reporter files three (3) volumes of trial transcript.

THE INDICTMENT

1 COUNT I

(Filed Apr 10 1969) (Caption No. 35)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment,

2 and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Paul P. Erlenbaugh, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash

Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Paul P. Erlenbaugh would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the
3 Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, John C. Hintz.

(f) It was a further part of the said conspiracy that John C. Hintz, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Paul P. Erlenbaugh and William H. Mitchell, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

Indictment

At the approximate times hereinafter mentioned, the defendants Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof.

1. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a rear entrance at 103 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 27th day of August, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, accepted a horse bet at 103 State Street, Hammond, Indiana.

4. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a rear entrance at 103 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

6. On the 28th day of August, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, accepted a horse bet at 103 State Street, Hammond, Indiana.

7. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

8. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, William H. Mitchell, ac-

cepted a horse bet at 103 State Street, Hammond, Indiana.

9. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, Paul P. Erlenbaugh, was present at 103 State Street, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 27th day of August, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, William H. Mitchell and John C. Hintz, did use and cause
5 to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 28th day of August, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court the defendants, William H. Mitchell and John C. Hintz, did use and cause to

be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the
6 said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 24th day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana

to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moeliering
Alfred W. Moeliering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice

37 MOTION TO DISMISS

(Filed Jun 5 1969)(Caption No. 35)

Come now the defendants, Erlenbaugh and Mitchell, and move the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendants are charged in a four-count indictment with violation of Title 18 U.S.C. Sections 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicated upon the use of an interstate facility, to-wit: the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendants to carry on an unlawful activity, to-wit: bookmaking on horse races.

38 3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper

sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b). As a further ground for dismissal of all counts of the indictment, defendant Erlenbaugh avers that prior to the date of his arrest and his indictment, he had been obliged for many years last past, under threat of federal prosecution, to comply with the registration requirements of 26 U.S.C. 4401 et seq.

4. Defendant Erlenbaugh's compliance with 26 U.S.C. 4401 et seq violated his privilege against self-incrimination and provided the Government with information which led to the initiation of the present prosecution and which further provided the Government with substantial evidence to prove an essential and material element of the charge, to-wit: that defendant is engaged in gambling, in violation of the laws of the State of Indiana. That after the defendant for many years had complied with the provisions of 26 U.S.C. 4401 et seq, the Supreme Court of the United States has held that the registration provisions of said Act are unconstitutional in that they violate the privilege against self-incrimination. That it was defendant's coerced compliance with the provisions of 26 U.S.C. 4401, which said registration was made public information and available to agents of the Federal Bureau of Investigation, which led to the initiation of the present prosecution against the defendant Erlenbaugh.

5. Unless the Government concedes that defendant Erlenbaugh's compliance with the wagering tax provisions provided the Government with information and evidence

provided the Government with information and evi-
39 dence which led to the initiation of the prosecution of

the defendants, defendants request an evidentiary hearing on this motion to dismiss in order to establish that it was defendant Erlenbaugh's coerced compliance

with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

6. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Max Cohen
Max Cohen
Attorney for Defendants, Paul P. Erlenbaugh and William H. Mitchell, 475 Broadway, Gary, Indiana.

45 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS
(Filed Jun 5 1969)

I.

The Motion to Dismiss

The first ground asserted for relief in the motion to dismiss is predicated on the contention of defendants that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210 F. Supp. 456, affirming 325 F. 2d 148, C.A. 7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

46 In U. S. v. Kelly (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication" . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380 F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of Title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility to promote an unlawful activity within the meaning of Section 1952, which was contemporaneously enacted.

There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not interdicted by the Act.

II.

The Second Ground of the Motion to Dismiss, the Motion to Suppress and the Motion to Issue Subpoena Duces Tecum

The basis for the relief requested in these motions is essentially the same; that the defendant Erlenbaugh's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and
47 investigative leads which led to the initiation of the present prosecution.

In Marchetti v. U. S., 390 U.S. 39 (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that

a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restrictions on the use of the information collected under the statute because of the evident congressional purpose to provide aid to prosecutors.

In Marchetti, Justice Harlan noted:

> "Information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties . . . Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained. Finally, we are obliged to notice that a former Commissioner of Internal Revenue has acknowledged that the Service 'makes available' to law enforcement agencies the names and addresses of those who have paid the wagering taxes, and that it is in 'full cooperation' with the efforts of the Attorney General of the United States to suppress organized gambling, Caplin, The Gambling Business and Federal Taxes . . . Petitioner was confronted by a comprehensive system of federal and state prohibitions against wagering activities; he was required, on pain of criminal prosecution, to provide informa-

tion which he might reasonably suppose would be available to prosecuting authorities and which would surely prove a significant link in the chain of evidence tending to establish his guilt. . ."

48 Justice Harlan went on to note that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and compels injurious disclosures which may provide or assist in the collection of evidence admissible in a prosecution for past or present offenses; that the acquisition of a federal gambling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which the government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rationale which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C.

49 4741 et seq. In Leary v. U.S., 5 Cr. Law Reporter, BNA 3053 and U.S. v. Covington, 5 Cr. Law Reporter, BNA 3068.

Support for the evidentiary hearing requested in the case at bar is found in U. S. v. Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b) 4, which permits the District Court to conduct factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.

Respectfully submitted,
/s/ Max Cohen
Max Cohen,
Attorney for Defendants, Paul P. Erlenbaugh and William H. Mitchell,
475 Broadway, Gary, Indiana.

51 MOTION TO DISMISS

Come now the defendant, John C. Hintz, and moves the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendant is charged in a four-count indictment with violation of Title 18 U.S.C. Section 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicated upon the use of an interstate facility, to-wit: the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendant to carry on an unlawful activity, to-wit: bookmaking on horse races.

3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b).

4. That as a further ground for dismissal one of the co-defendants herein, has for years, under threat of federal prosecution, complied with the registration requirement of 26 U.S.C. 4401 et seq.

5. That as a result of the compliance with 26 U.S.C. 4401 et seq the Government had access to and was provided with substantial evidence to prove an essential and material element of the charge to-wit; that the defendants did violate Sections 10-2304, 10-2311 and 10-2331 of 52 Burns Indiana Statutes (1956 Replacement).

6. That the Supreme Court of the United States has held that those sections of 26 U.S.C. 4401 regarding registration are unconstitutional in that they violate the privilege against self-incrimination.

7. Unless the Government concedes that defendants compliance with the wagering tax provisions provided the Government with information and evidence of the prosecution of the defendants, defendants request an evidentiary hearing on this motion to dismiss in order to establish that it was defendants coerced compliance with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

8. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendant John C. Hintz
2824 173rd Suite B
Hammond, Indiana

57 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS

I.

THE MOTION TO DISMISS

The first ground asserted for relief in the motion to dismiss is predicated on the contention of defendant that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210 F. Supp. 456, affirmed 325 F. 2d 148, C.A.7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

In U.S. v. Kelly (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380 F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility
58 to promote an unlawful activity within the meaning of Section 1952, which was contemporaneously enacted.

There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question

is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not inderdicted by the Act.

II.

THE SECOND GROUND OF THE MOTION TO DISMISS, THE MOTION TO SUPPRESS AND THE MOTION TO ISSUE SUBPOENA DUCES TECUM

The basis for the relief requested in these motions is essentially the same; that the defendant Erlenbaugh's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and investigative leads which led to the initiation of the present prosecution.

In Marchetti v. U.S., 390 U.S. (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restriction on the use of the information collected under the statute because of the evident congressional purpose to provide aid to prosecutors.

Justice Harlan noted that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and complete injurious disclosures which may provide or assist in the collection

of evidence admissable in a prosecution for present offenses; that the acquisition of a federal gambling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions, or federal laws forbidding the use of interstate facilities for gambling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

59 Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rational which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C. 4741 et seq. In Leary v. U.S., 5 Cr Law Reporter, BNA 3053, and U.S. v. Covington, 5 CR Law Reporter, BNA 3068.

Support for the evidentiary hearing requested in the case at bar is found in U.S. v. Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b) 4, which permits the District Court to conduct factual hearings prior to

trial if necessary to resolve issues of fact peculiar to the motion.

Respectfully submitted,
/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendant John C. Hintz
2824 173rd Suite B
Hammond, Indiana

72 ORDER (Caption No. 35)

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

95 (Caption No. 35)

We, the Jury, find the defendant, Paul P. Erlenbaugh, guilty as charged.

July 1, 1970

/s/ Theodore R. Lucas
(Foreman)
Theodore R. Lucas

96

We, the Jury, find the defendant, William H. Mitchell,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III

July 1, 1970

/s/ Theodore R. Lucas
(Foreman)
Theodore R. Lucas

97

We, the Jury, find the defendant, John C. Hintz,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III

/s/ Theodore R. Lucas
(Foreman)

(Caption No. 35) Theodore R. Lucas

102 On this 7th day of August, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Title 18, Section 371—Conspiracy as charged in 1 Count of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and Convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, 6 months to be served. The remaining 1½ Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release.

It Is Adjudged that defendant is granted a stay of execution until August 14, 1970, at 9:00 a.m. at which time defendant shall surrender himself to the United States Marshal at his office in Hammond, Indiana.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

shal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to:

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

A True Copy. Certified this 11th day of August, 1970
(Signed) /s/ Francis T. Grandys
Clerk.
(By) /s/ Marilyn Stjkic
Deputy Clerk.

103 On this 7th day of August, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of Title 18, Section 371 - Conspiracy; Title 18, Section 1952(a) (3) and (2) - Interstate Transportation in Aid of Racketeering; and Aiding and Abetting as charged in 3 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that defendant is sentenced to Two (2) Years, which sentence is suspended and defendant is placed on probation for a period of Three (3) Years as to each of Counts 1, 2 and 3, to run concurrently.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abid-

ing, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.
/s/ Francis T. Grandys
Clerk.

104 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

United States of America
v.
John C. Hintz
} No. 69 H CR 35

On this 7th day of August, 1970, came the attorney for the government and the defendant appeared in person, and[1] by counsel

It Is Adjudged that the defendant upon his plea of[2] not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy
Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting

as charged[3] in 3 Counts of Indictment and the court having asked the defendant whether he has anything to

say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that[1]

defendant is sentenced to TWO (2) YEARS which sentence is suspended and defendant is placed on probation for a period of THREE (3) YEARS as to each of Counts 1, 2 and 3, to run concurrently. Said sentence to run concurrently with sentence imposed in 69 H CR 37.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

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[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

105 NOTICE OF APPEAL (Caption No. 3

Notice is hereby given that Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 7th day of August, 1970.

Dated: August 12, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 37
ADRIAN J. WHITE, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 37)
DOCKET ENTRIES

Date	Proceedings
4-10-69	Indictment filed. Praecipe for warrant filed. Warrants iss. and given to Marshal.
5- 9-69	Defendants, Adrian J. White, John C. Hintz and James Lloyd, present in court with counsel, Theodore Puchowski. Defendants plead Not Guilty to all counts. Defendants request trial by jury. Defendants request time to file motion to indictment. Request granted to May 23, 1969.
6- 9-69	Defendants, file Motion to Dismiss; Motion for Issuance of Subpoena Duces Tecum; Motion to Suppress; with Memorandum in Support thereof.
12-29-69	Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is Denied. (SE) Beamer:J. (copies to counsel). Memorandum attached thereto.
6-16-70	Cause for trial. Government represented by Frank Kimbrough, Asst. U. S. Atty. and Marvin Loewy. Defendants present in person and by counsel, Ted Puchowski. Jury sworn voir dire. Jury examined, selected, accepted and sworn to try this cause: 1. Joseph J. Violanti 2. Vernice Washington 3. Delmar J. Zeiters 4. Thomas Economou 5. Harold F. Singer 6. William Kovach 7. Eugene Janeczko 8. Wil-

liam Sako, Jr. 9. Donald E. Proffitt 10. Leonard R. Vail 11. Rose Ann Michnik 12. Robert Beison Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants present opening statement. Government presents evidence, concludes and rests. Cause continued until Wednesday, June 17, 1970, at 9:30 a.m.

6-17-70 Trial resumed. Defendants move for judgment of acquittal. Arguments heard. Motion denied. Defendants rest without presentation of any evidence. Government tenders instructions numbered 1-14. Court gives 1 as modified, 2 as modified, 3 as modified, 4 as modified, 5 as modified, 8, 9 as modified, and 10. All others refused. Defendants tender no instructions. Government presents closing argument. Defendants present closing argument. Government presents final argument. Court instructs the jury. Bailiff sworn. 1:30 p.m. Jury retires to commence deliberation. U. S. Marshal authorized to provide meals for the jury. 2:00 p.m. Jury returns into open court with following verdicts: We, the Jury, find the defendant, Adrian J. White, Guilty on Ct. I, II, III, and IV. signed Joseph J. Violanti, Foreman. We, the Jury, find the defendant, John C. Hintz, Guilty on Count I, III, and IV. signed Joseph J. Violanti, Foreman. We, the Jury, find the defendant, James Lloyd, Guilty on Count I and II. signed Joseph J. Violanti, Foreman. Verdicts filed. Jury discharged.

Defendants to stand at liberty on bond heretofore filed. Govt. moves to withdraw exhibits 7, 8, 9 and 10 and submit copies. Motion granted. Matter referred to probation office for pre-sentence investigation. George N. Beamer, Judge. Gerry R. Yates, Court Reporter.

8- 7-70 Defendant, James Lloyd, present in court with counsel, Theodore Puchowski. Defendant sentenced: 2 yrs. sentence suspended and defendant placed on probation for 3 yrs. as to each of Counts 1 and 2, to run concurrently. Judgment and Order of Probation issued. (SE) Beamer: J

8- 7-70 Deft. John C. Hintz present in court with counsel T. Puchowski. Defendant sentence: 2 years, which sentence is suspended and def. placed on probation for a period of 3 years as to each of Counts 3 and 4, to run concurrently with sentence imposed in 69 H CR 35. Judgment and Order of Probation issued. (SE) Beamer: J.

8- 7-70 Deft. Adrian J. White present in court with counsel T. Puchowski. Deft. sentenced: 2 year, 6 months to be served. The remaining 1-1/2 years is suspended and the deft. is placed on probation for a period of 3 years to begin upon release. It Is Adjudged that the defendant is granted a stay of execution until August 14, 1970, at 9:00 A.M. at which time defendant shall surrender himself to the United States Marshal at his office in Hammond, Indiana.

Judgment and Order of Probation issued. (SE) Beamer: J. Defendants to remain on bond previously filed pending appeal. Probation requirements suspended pending appeal.

8-12-70 Defendants, Adrian J. White, John C. Hintz and James Lloyd, file Notice of Appeal.

8-31-70 Court reporter files trial transcript held on 6-16-70 and 6-17-70.

1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 37) • •

COUNT I
(Filed Apr 10 1969)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Adrian J. White, John C. Hintz and James Lloyd, the defendants did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce, with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Section 10-2304,

10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Adrian J. White, would manage and carry a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered to the defendants by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant Adrian J. White, would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the

Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, John C. Hintz.

(f) It was a further part of the said conspiracy that John C. Hintz, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Adrian J. White and John C. Hintz, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Adrian J. White, John C. Hintz and James Lloyd, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, James Lloyd, received copies of the Illinois Sports News in the vicinity of the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, James Lloyd entered 658 State Street, Hammond, Indiana.

3. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted copies of the Illinois Sports News from James Lloyd, defendant, at 658 State Street, Hammond, Indiana.

4. On the 19th day of September, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted a horse bet at 658 State Street, Hammond, Indiana.

4 5. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

6. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered 658 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News..

7. On the 23rd day of October, 1968, in the Northern District of Indiana, defendants, John C. Hintz and Adrian J. White, accepted horse bets at 658 State Street, Hammond, Indiana.

8. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

9. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, John C. Hintz, entered 658 State Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

10. On the 24th day of October, 1968, in the Northern District of Indiana, defendant, Adrian J. White, accepted a horse bet at 658 State Street, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 19th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White, and James

Lloyd, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1965 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 23rd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to per-

Indictment

form acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 24th day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Adrian J. White and John C. Hintz, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill

/s/ Frank A. Hollingshead

Foreman

Motion to Dismiss
(Caption No. 37)

33 MOTION TO DISMISS

(Filed Jun 6 1969)

Comes now the defendants Adrian J. White, John C. Hintz, and James Lloyd, and move the Court to dismiss all counts of the indictment and, in support of said motion, represent to the Court as follows:

1. Defendants are charged in a four-count indictment with violation of Title 18 U.S.C. Section 1952 (a) 3 and 2, and conspiracy to violate said sections.

2. The conspiracy count as well as the substantive counts of the indictment are predicted upon the use of an interstate facility, to-wit; the Chicago South Shore and South Bend Railroad, to transport copies of the Illinois Sports News, which said copies were allegedly used by the defendant to carry on an unlawful activity, to-wit: bookmaking on horse races.

3. The Illinois Sports News, the publication in question, has been judicially held to be a newspaper sold and distributed to the general public and is specifically exempted under Title 18, Section 1953 (b).

4. That as a further ground for dismissal that defendant Adrian J. White has for years under threat of federal prosecution, complied with the registration requirement of 26 U.S.C. 4401 et seq.

5. That as a result of the compliance with 26 U.S.C. 4401 et seq the Government had access to and was provided with substantial evidence to prove an essential and material element of the charge to-wit; that the defendants did violate Sections 10-2304, 10-2307,

34 10-2311 and 10-2331 of Burns Indiana Statues (1956 Replacement)

6. That the Supreme Court of the United States has held that those sections of 26 U.S.C. 4401 regard-

Motion to Dismiss

ing registration are unconstitutional in that they violate the privilege against self-incrimination.

7. Unless the Government concedes that defendant White's compliance with the wagering tax provisions provided the Government with information and evidence which led to the initiation of the prosecution of the defendants, defendants request on evidentiary hearing on this motion to dismiss in order to establish that it was defendants coerced compliance with the wagering tax provisions which led to the initiation of this prosecution and provided the Government with evidence which the Government intends to use on the trial of this cause.

8. The indictment, for all of the reasons hereinabove set forth, fails to state facts sufficient to constitute an offense against the laws of the United States of America.

Wherefore, defendants pray that the indictment be dismissed.

/s/ Theodore Puchowski
Theodore Puchowski
Attorney for Defendants Adrian J. White, John C. Hintz, and James Lloyd
2824 173rd Suite B
Hammond, Indiana

35-36 • • •

Memorandum in Support of Motion

37 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM AND MOTION TO SUPPRESS

(Caption No. 37) I.

THE MOTION TO DISMISS
(Filed Jun 6 1969)

The first ground asserted for relief in the motion to dismiss is predicated on the contention of the defendant that the publication in question, the Illinois Sports News, is exempt from the provisions of the Act.

In Kelly v. Bell Telephone Co., D.C. Ill. (1962) 210F. Supp. 456, affirmed 325 F. 2d 148, C.A. 7 (1963), it was held that the very publication in question constituted "information" for use in news reporting of sporting events or contests within the exception to this section forbidding the transmission of gambling information.

In U.S. v Kelly, (1964) 328 F. 2d 227, it was again held that a publication containing news of sporting events principally related to horses and horse racing and containing race results and predictions, came within the definition of ". . . any newspaper or similar publication . . . and was exempt from operation of this section (1953) prohibiting interstate transportation of wagering paraphernalia.

In U.S. v. Arnold (1967) 380F. 2d 366, it was held that if a paper was not within the ban of Section 1953 of Title 18 proscribing interstate transportation of wagering paraphernalia, the use of a telephone to order its transmittal through the mails would not be the use of a facility to promote an unlawful activity within

the meaning of Section 1952, which was contemporaneously enacted.

38 There has been a judicial declaration by the Court of Appeals of this circuit that the publication in question is exempt from the provisions of this Act. Therefore, the use of any facility, be it either telephone or railroad, to order or obtain the transmittal of that publication, is not erdicted by the Act.

II.

THE SECOND GROUND OF THE MOTION TO DISMISS, THE MOTION TO SUPPRESS AND THE MOTION TO ISSUE SUBPOENA DUCES TECUM

The basis for the relief requested in these motions is essentially the same; that the defendant White's coerced compliance with the provisions of 26 U.S.C. 4401 et seq provided the government with information and investigative leads which led to the initiation of the present prosecution.

In Marchetti v U.S., 390 U.S. (1968) and Grosso v. U.S., 290 U.S. 62 (1968), the Supreme Court held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U.S.C. 4411-4412. It was noted there that wagering was a crime in almost every state, and that 26 U.S.C. 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. In those cases the Supreme Court rejected the government's suggestion to impose restriction on the use of the information collected under the state because of the evidence congressional purpose to provide aid to prosecutors.

Memorandum in Support of Motion

Justice Harlan noted that the satisfaction of the requirements of the registration provisions centers attention upon the registrant as a gambler and complete injurious disclosures which may provide or assist in the collection of evidence admissable in a prosecution for present offenses; that the aquisition of a federal gambeling tax stamp obliges even a prospective gambler to accuse himself of conspiracy to violate either state gambling prohibitions. or federal laws forbidding the use of interstate facilities for gambeling purposes.

Marchetti seems further to require that before the government could proceed in the case at bar it must establish that evidence to be used in this prosecution was untainted by any connection with information obtained as a consequence of compliance with the wagering tax provisions.

39 Defendant in the case at bar asserts that it was his compliance with the wagering tax requirements which led to the initiation of the present prosecution; that his compliance with those provisions has provided the government with substantial evidence which government intends to use on the trial of this cause; that unless the government concedes that defendant's compliance with the wagering tax provisions provided the government with material evidence with which to commence this prosecution, defendants would request an evidentiary hearing on this motion to dismiss to establish the same.

The rational which prompted the holding in Marchetti and Grosso was recently extended to the taxing requirements imposed by the Marijuana Tax Act, 26 U.S.C. 4741 et seq. in Leary v U.S., 5 Cr Law Reporter Bna 3053 and U.S. v Covington 5 CR Law Reporter, BNA 3068.

Order

Support for the evidentiary hearing requested in the case at bar is found in U.S. v Covington, where the Supreme Court cited Rule 12 (b) 1 of the Federal Rules of Criminal Procedure and Rule 12 (b)4, which permits the District Court to conduct factual hearings prior to trial necessary to resolve issues of facts peculiar to the motion.

Respectfully submitted,
/s/ Theodore Puchowski
Theodore Puchowski
Attorney for defendants Adrian J. White, John C. Hintz, and James Lloyd
2824 173rd Suite B
Hammond, Indiana

40-50 • • •

51 (Caption No. 3) ORDER

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

52-115 • • •

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

JAMES LLOYD

No. 69 H CR 37

FILED
JUN 17 1970
FRANCIS I. GRANDYS, CLERK

Jury Verdict

We, the Jury, find the defendant, James Lloyd,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count II

June 17, 19 70
(Date)

Joseph J. Verlanti
(Foreman)

A. O. Form No. 156 (May 1956) Verdict

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA

HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

JOHN C. HINTZ

No. 69 H CR 37

FILED

JUN 17 1970

A. FRANCIS T. GRANDYS, CLERK

Jury Verdict

We, the Jury, find the defendant, John C. Hintz,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count III
X	___	on Count IV

June 17, 1970.
(Date)

Joseph G. Gorcan ti
(Foreman)

A. O. Form No. 158 (May 1965)

United States District Court

FOR THE

NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA

v.

ADRIAN J. WHITE

No. 69 H CR 37

FILED
JUN 17 1970
FRANCIS T. GRANDYS, CLERK
At M

Jury Verdict

We, the Jury, find the defendant, Adrian J. White,

Guilty	Not Guilty	
X	___	on Count I
X	___	on Count II
X	___	on Count III
X	___	on Count IV

June 17, 19 70.
(Date)

Joseph J. Violanti
(Foreman)

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. JAMES LLOYD Cr. 69 HCR 37 (H Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2 yrs/ sentence suspended. Probation 3 yrs. on each count sentence to run concurrently.

Fine: _____

Probation: _____

Condition of Probation: _____

Judgment and Order of Probation issued: 8/7/70 M.S.

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. JOHN C. HINTZ Cr. 69 HCR 37(H) Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

#324 Juvenile

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2yrs. suspended. Probation 2yrs on each count. sentence to run concurrently. W 69 H Cr 35 as to Cts 1, 3-14

Fine: _____

Probation: _____

Condition of Probation: _____

Judgment

RECORD OF ARRAIGNMENT OR DISPOSITION

DATE: AUGUST 7, 1970 AT: HAMMOND, INDIANA

U. S. vs. ADRIAN J. WHITE Cr. 69 HCR 37 (E) Div.

Defendant present in court with counsel (a) Theodore Puchowski

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.

Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads: _____

Sentence: 2 yrs — 6 months to be served. Upon release from ~~penal~~ institution left ~~to be~~ placed on probation for 3 yrs on terms of ~~probation~~ sentence to run concurrently with sentence stayed until Aug 14 1970 at 9:00 AM pending intention to file appeal otherwise to surrender to marshal on said date and time.

Fine: _____

Probation: _____

Condition of Probation: _____

122-123 • • • (Caption No. 37)

124 **NOTICE OF APPEAL**

Notice is hereby given that Adrian J. White, John C. Hintz and James Lloyd, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 7th day of August, 1970.

Dated: August 12, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 36
FRANK J. KELLY, DEFENDANT	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

Docket Entries
(Caption No. 36)
APPENDIX

4-10-69 Indictment filed. Praecipe for warrants filed. Warrants iss. and given to Marshal.

5- 1-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.

5- 2-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

5- 9-69 Defendant, Frank J. Kelly, present in court with counsel, Charles W. Grubb.
Defendant advised of his right to have trial by jury.
Defendant arraigned and plead Not Guilty to all counts.
Defendant requests time to file motion to indictment. Request granted to May 23, 1969.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is denied. (SE) Beamer: J. (Copies to counsel). Memorandum attached thereto.

6-25-70 Government appears by Asst U. S. Attorney J. Frank Kimbrough and Marvin Loewy.
Defendant appears in person and by counsel Charles Grubb.
Cause called for trial by Jury. Prospective jurors in attendance, called and sworn on voir dire. The following were examined, selected, accepted and sworn to try this cause: (1) Richard Broadnax (2) Howard M. Slifko, Sr. (3) Gertrude Spanik (4) Arthur J. Kush (5) Marion D. Lindsley (6) Paula Vandermolen (7) Viola Reynolds (8) Juanita M. Williams (9) George S. Jarosz (10) James F. Razumich (11)

Mary L. Jamroz (12) Robert L. Huffman. Government makes opening statement by Marvin Loewy. Defendant makes opening statement. Defendant moves for the separation of witnesses. Motion granted. Government presents evidence and rests. Cause continued to 9:30 A.M. June 26, 1970

6-26-70 All parties present. Jury in attendance. Trial resumed. Defendant presents evidence and rests. Government offers Rebuttal evidence and rests. Both sides rest.

Government tenders instructions 1 to 9; Court accepts amended instructions 2, 4, 6 and 7 and gives 3, 5 and 9 as tendered. 1 and 8 are refused. Defendant tenders instructions 1 to 4; Four is accepted, all others refused.

Government presents final argument.

Defendant presents final argument.

Government presents closing argument.

Court charges the jury by giving its own instructions 1 to 22 inclusive, Defendant's instruction 4 and Government's instructions 2, 4, 6 and 7 as modified and gives 3, 5 and 9 as tendered.

3:10 P.M. Jury retires to deliberate upon a verdict in charge of sworn bailiff.

6:05 P.M. Jury returns into court with following verdict: "We the jury find the defendant, Frank J. Kelly, guilty as charged in the indictment" dated 6-26-70 Howard M. Slifko, Sr., Foreman

Jury discharged. Defendant to stand at liberty on bond heretofore filed. Matter referred to Probation officer for pre-sentence investigation.

8-14-70 Defendant, Frank J. Kelly, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs, impr., 6 mos. to be served, remaining 1-1/2 yrs. suspended and deft. placed on probation for 3 yrs. following release, as to each of Counts 1 and 3, to run concurrently. Defendant to remain at liberty on bond previously filed pending appeal. Judgment and Commitment issued. (SE) Beamer: J.

8-14-70 Deft., Kelly files Notice of Appeal.
Clerk's Certificate of Mailing issued and forwarded to counsel.
(Cert. copy of Docket Entries and Notice forwarded to U. S. Court of Appeals)

9-17-70 Court reporter files trial transcript held on 6-26-70.

1 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 HCR 36) • •

COUNT I
(Filed Apr 10 1969)

The Grand Jury charges:

From on or about the 13th day of August, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly and Charles R. Buckler, the defendants herein named, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against

the United States, to wit: to use and cause to be used a facility in interstate commerce, with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants, Raymond Morris Goodman and Frank J. Kelly, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Raymond Morris Goodman would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said

copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of the said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendants, Gary Gerald Goodman and Raymond Morris Goodman.

3 (f) It was a further part of the said conspiracy that Gary Gerald Goodman, Raymond Morris Goodman and Charles R. Buckler, the defendants, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Frank J. Kelly and Raymond Morris Goodman, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly and Charles R. Buckler, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 4th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 4th day of September, 1968, in the Northern District of Indiana, defendants Gary Gerald Goodman and Raymond Morris Goodman left the South Shore Train Station carrying copies of the Illinois Sports News.

3. On the 4th day of September, 1968, in the Northern District of Indiana, defendant Gary Gerald Goodman, entered Marty's Tap, 519 Conkey Street, Hammond, Indiana, carrying copies of the Illinois Sports News.

4 4. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, left the South Shore Train Station carrying copies of the Illinois Sports News.

6. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Gary Gerald Goodman, upon leaving the South Shore Train Station gave copies of the Illinois Sports News to the defendant, Charles R. Buckler.

7. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Charles R. Buckler, entered the Calumet Tap, 4950 Calumet Avenue, East Chicago, Indiana, carrying copies of the Illinois Sports News.

8. On the 5th day of September, 1968, in the Northern District of Indiana, defendant Frank J. Kelly, accepted a horse bet at 517 Conkey Street, Hammond, Indiana.

9. On the 22nd of October, 1968, in the Northern Distric of Indiana, defendant, Raymond Morris Goodman, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

10. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Raymond Morris Goodman, left the South Shore Station at 4531 Hohman Avenue,

Hammond, Indiana, carrying copies of the Illinois Sports News.

11. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Raymond Morris Goodman, accepted a horse bet at 517 Conkey Street, Hammond, Indiana.

5 COUNT II

The Grand Jury further charges:

On or about the 4th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond Morris Goodman and Gary Gerald Goodman, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 5th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the de-

fendants, Raymond Morris Goodman, Gary Gerald Goodman, Frank J. Kelly, and Charles R. Buckler, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

6

COUNT IV

The Grand Jury further charges:

On or about the 22nd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond Morris Goodman, and Gary Gerald Goodman did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage,

7

carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Section 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice
8-12 • • •

13 UNITED STATES DISTRICT COURT

• • (Caption No. 69 H Cr No. 36) • •

MOTION TO DISMISS INDICTMENT
(Filed May 1, 1969)

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on April 10, 1969, and for a discharge of all defendants therein charged, on the ground that the allegations contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P. O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 1st day of May, 1969.

United States Attorney
N D of Ind. Hammond Divisior
By: /s/ Dorothea Snyder

14 UNITED STATES DISTRICT COURT
• • (Caption No. 69 H Cr No. 36) • •

BRIEF IN SUPPORT OF MOTION
TO DISMISS INDICTMENT
(Filed May 2, 1969)

The defendants stand charged with violating Section 1952 (a) (3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs

Illinois Bell Telephone and Kelly vs UPI in (7th CCA) 325 Fed. Facts in 210 F. Supp. 456 2nd 148. See also US vs Kelly (1964, Ky.) 328 (6th CCA) Fed. 2nd 227.

A 1967 decision in US vs Arnold, (4th CCA) (Va) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility' • • • to • • • promote • • • any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts".

We must construe Sections 1952 and 1953 in pari materia. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under

the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility is not banned. This is not the use of an interstate facility intended under Section 1952.

16 It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request a dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb, Attorney
for Defendants
P.O.Box 354, Cedar Lake, Ind. 46303

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 2nd day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

Order, Verdict and Judgment

17-58 • • • (Caption No. 36)

ORDER

59 (Filed December 29 1969)

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

91 "A" UNITED STATES DISTRICT COURT

• • (Caption No. 69 HCR 36) • •

VERDICT

(Filed June 26, 1970)

We, the Jury, find the defendant, Frank J. Kelly, guilty as charged in the Indictment.

6/26, 1970 (Date) — Howard M. Slefko, Sr. (Foreman)

92 RECORD OF ARRAIGNMENT OR DISPOSITION

Date: August 14, 1970 At: Hammond, Indiana
U. S. vs. Frank J. Kelly Cr. 69 HCR 36 (H) Div.
Defendant present in court with counsel (a) Charles W. Grubb

(b) Being advised of his constitutional right to be represented by counsel and having been asked by the court whether he desired counsel appointed by the court, thereupon stated that he waived assistance of counsel.
Defendant files waiver and consent to be prosecuted under Juvenile Delinquency Act.

(c) Defendant advised of his right to have matter submitted to a Grand Jury and to have trial by jury.

(d) Defendant signs written waiver of prosecution by indictment and consent to trial by information, in open court.

(e) U. S. Attorney files waiver, consent and an Information.

(f) Written consent of the defendant to transfer of venue within the District filed.

(g) Defendant received and read copy of Information.

Defendant arraigned and pleads:

Sentence: As to each of Cts. 1 and 3 2 yrs impr. 6 mos. to be served. remaining 1 1/2 yrs. suspended and placed on probation for 3 yrs. following release.

Fine: to run concurrently.

Probation:

Deft. to remain at liberty on bond previously filed pending appeal.

Condition of Probation:

Judgment and Commitment issued: 8/14/70 M.S.

93 IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69 HCR 36) • •

NOTICE OF APPEAL
(Filed August 14, 1970)

Notice is hereby given that Frank J. Kelly, defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 14th day of August, 1970.

Dated: August 14, 1970

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendant.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR 41
RAYMOND J. KULIK, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 41)

DOCKET ENTRIES

5-22-69 Indictment filed. Praecipes for Warrants filed.

6- 6-69 Defendants, Raymond J. Kulik and Eddie Dobrowski, present in court with counsel, Charles W. Grubb. Defendants arraigned and plead Not Guilty to all 5 Counts. Defendants request and are granted to June 20 to file motion to indictment.

6-17-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.—

6-17-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment. The motion to dismiss is denied. (SE) BEAMER: J.
(copies to counsel). Memorandum attached thereto.

7- 8-70 Govt appears by J. Frank Kimbrough, Asst. U. S. Atty., and Marvin Loewy.
Defts. Raymond J. Kulik and Eddie Dobrowski appear in person and by counsel, Charles Grubb. Cause called for trial by jury. Prospective jurors called and sworn on voir dire. The following were examined, selected, accepted, and sworn as jurors to try this cause: 1. Richard Zuniga; 2. Roberto Cruz; 3. Otis Shivers; 4. Harry G. Gentry; 5. Ronald G. Piercy; 6. Ron-

ald E. Schuttrow; 7. Paul Banks; 8. Cora Landers; 9. Charles R. Gard; 10. Nicholas Ronish; 11. Etta Grady; and 12. William Artibey. Defts. move for separation of witnesses, Motion granted. Witnesses ordered separated.
Govt. presents opening statement.
Defts. reserve right to make opening statements at close of Govt. evidence.
Govt. presents evidence, concludes and rests.
Defts., out of the hearing of the jury, move for a directed verdict.
Motion denied.
Defts. present opening statements.
Defts. present evidence, conclude and rests.
Govt. presents evidence in rebuttal and rests.
Both sides rest.
Cause continued for further trial to July 9, 1970 at 9:30 a.m.
BEAMER: KNIGHT-YATES

7- 9-70 All parties present. Jury in attendance. Trial resumed.
Govt. presents final arguments. Defts. present final argument.
Govt. presents closing arguments. Defts. tender instructions 1 & 2, which are by the Court refused. Govt. tenders instructions 1 & 2 which are by the Court refused. Court charges the jury by giving its own instructions one to 31 inclusive. Jury retires to deliberate upon a verdict in charge of sworn bailiff. Jury returns into open court with following verdicts: "We, the Jury, find the deft., Raymond J. Kulik Guilty on Count 1; Guilty on Count II; Guilty on Count III and Guilty on Count V.

We, the Jury, find the deft., Eddie Dobrowski, guilty on Count I; Guilty on Count IV; and Guilty on Count V. July 9, 1970. Signed, Richard Zuniga, Foreman.
Defts, to stand at liberty on bond heretofore filed. Matter referred to Probation Officer for pre-sentence investigation.

8-14-70 Defendant, Raymond J. Kulik, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs. impr., 6 mos. to be served, remaining 1-1/2 yrs. suspended and deft. placed on probation for 3 yrs. following release, as to each of Counts 1, 2, 3 and 5, to run concurrently. Defendant to remain at liberty on bond previously filed pending appeal.
Judgment and Commitment issued.
(SE) Beamer: J.

8-14-70 Defendant, Eddie Dobrowski, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs. impr., suspended, probation 3 yrs. as to each of Counts 1, 4 and 5, to run concurrently. Probation requirements suspended pending appeal. Judgment and Order of Probation issued. (SE) Beamer: J.

8-14-70 Defts., Kulik and Dobrowski file Notice of Appeal.
Clerk's Certificate of Mailing issued and forwarded to counsel.
(cert. copy of Docket Entries and Notice forwarded to U. S. Court of Appeals)

9-17-70 Court reporter files trial transcript held on 7-8-70 and 7-9-70. Yates, reporter.

1 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

COUNT I
(Filed May 22 1969)

The Grand Jury charges:

From on or about the 24th day of July 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October 1968, in the Northern District of Indiana and elsewhere, Raymond J. Kulik, Roy Woodward and Eddie Dobrowski, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952(a)(3), all in violation of Title 18, United States Code, Section 371.

2 The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendant, Raymond J. Kulik, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants, would order and subscribe to copies of the Illinois Sports News which would be delivered to the defendants by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendant, Raymond J. Kulik, would make arrangements with other co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore train from Illinois and deliver the said copies to the defendant Roy Woodward.

(f) It was a further part of the said conspiracy that Roy Woodward, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations

and places where horse race bookmaking would be carried on.

3 (g) It was a further part of the said conspiracy that Raymond J. Kulik and Eddie Dobrowski, defendants, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said bookmaking activity.

At the approximate times hereinafter mentioned, the defendants Roy Woodward, Eddie Dobrowski and Raymond J. Kulik, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 31st day of July 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

2. On the 31st day of July 1968, in the Northern District of Indiana, defendant Raymond J. Kulik, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 31st day of July 1968, in the Northern District of Indiana, defendant Raymond J. Kulik, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

4. On the 7th day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

5. On the 7th day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

4 6. On the 7th day of August 1968, in the Northern District of Indiana, defendant, Raymond J. Kulik,

accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

7. On the 15th day of August 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

8. On the 15th day of August 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

9. On the 15th day of August 1968, in the Northern District of Indiana, defendant Eddie Dobrowski, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

10. On the 21st day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

11. On the 21st day of August 1968, in the Northern District of Indiana, defendant Roy Woodward, entered a rear entrance at 4534 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

12. On the 21st day of August 1968, in the Northern District of Indiana, defendant Eddie Dobrowski, accepted a horse bet at 4534 Hohman Avenue, Hammond, Indiana.

COUNT II

The Grand Jury further charges:

On or about the 31st day of July 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the de-
5 fendants, Raymond J. Kulik and Roy Woodward, did use a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Ham-

mond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT III

The Grand Jury further charges:

On or about the 7th day of August 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond J. Kulik and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of said unlawful activity in violation of Title 18, United States Code, Sections 1952 (a)(3) and 2.

COUNT IV

The Grand Jury further charges:

On or about the 15th day of August 1968 at, Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Eddie Dobrowski and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2312, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT V

The Grand Jury further charges:

On or about the 21st day of August 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Raymond J. Kulik, Eddie Dobrowski, and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: the Chicago South Shore and South Bend Railroad Train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and

facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns
7 Indiana Statutes (1956 Replacement), Sections 10-2304 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney
/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U.S. Department of Justice

21 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

MOTION TO DISMISS INDICTMENT

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on May 22, 1969, and for a discharge of all defendants therein charged, on the ground that, the allegations

contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P. O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 17th day of June, 1969.

United States Attorney
N D of Ind. Hammond Division
by: R. Litteral

22 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

BRIEF IN SUPPORT OF
MOTION TO DISMISS INDICTMENT
(Filed Jun 17 1969)

The defendants stand charged with violating Section 1952(a)(3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs Illinois Bell Telephone and Kelly vs UPI in 325 Fed. 2nd 148 (7th CCA) (Facts in 210 F. Supp 456). See also US vs Kelly (1964, Ky.) (6th CCA) 328 Fed. 2nd 227.

A 1967 decision in US vs Arnold, (Va) (4th CCA) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is

not the use of a 'facility' • • • to • • • promote • • • any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts."

We must construe Sections 1952 and 1953 in parimateria. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility intended under Section 1952.

It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P.O. Box 354,
Cedar Lake, Indiana 46303

Order and Verdict

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 17th day of June, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ R. Litteral

25-50 • • •
51 • • •

(Caption No. 41) ORDER

The defendants have filed a motion to dismiss the indictment. The motion to dismiss is denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

• • •

52-53 • • •
54-120 • • •

121 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •

(Filed Jul 9 1970)

We, the Jury, find the defendant, Eddie Dobrowski,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count IV
x	.....	Count V

/s/ Richard Zuniga
(Foreman)

July 9, 1970.
(Date)

122 UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H Cr 41) • •
(Filed Jul 9 1970)

We, the Jury, find the defendant, Raymond J. Kulik,

Guilty	Not Guilty	
x	.....	Count I
x	.....	Count II
x	.....	Count III
x	.....	Count V

/s/ Richard Zuniga
(Foreman)

July 9, 1970.
(Date)

123a

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H CR 41) • •

On this 14th day of August, 1970 came the attorney for the government and the defendant appeared in person and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy
Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting

as charged in 4 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) Years, 6 months to be served. The remaining 1-1/2 Years is suspended and defendant is placed on probation for a period of Three (3) Years to begin upon release, as to each of Counts 1, 2, 3 and 5, to run concurrently.

It Is Adjudged Defendant to remain at liberty on bond previously filed pending appeal.

A True Copy:
Attest: Francis T. Grandys, C.erk
By /s/ Hildred Bolsega
Deputy Clerk

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge.

The Court recommends commitment to:

/s/ Francis T. Grandys,
Clerk.

A True Copy. Certified this 18th day of August, 1970
(Signed) /s/ Francis T. Grandys
Clerk.
(By) /s/ Marilyn Stajkic
Deputy Clerk.

125 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 H CR 41) • •

On this 14th day of August, 1970, came the attorney for the government and the defendant appeared in person, and by counsel.

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a)(3) and 2—Interstate Transportation in Aid of Racketeering; and Aiding and Abetting as charged in 3 Counts of Indictment

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that defendant is sentenced to Two (2) Years, which sentence is suspended and defendant is placed on probation for a period of Three (3) years as to each of Counts 1, 4 and 5, to run concurrently.

Probation requirements suspended pending appeal.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Brandys
Clerk.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

• • (Caption No. 69 HCR 41) • •

NOTICE OF APPEAL
(Filed Aug 14 1970)

Notice is hereby given that Raymond J. Kulik and Eddie Dobrowski, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 14th day of August, 1970.
Dated: August 14, 1970.

/s/ Charles W. Grubb
Charles W. Grubb
P. O. Box 354
Cedar Lake, Indiana 46303

Tel.: 219-374-7056
Attorney for Defendants

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA
HAMMOND DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF	)	
vs	)	No. 69 HCR
EDWARD JOSEPH MISIOLEK, ET AL, DEFENDANTS	)	

APPENDIX

The following pages contain the Docket Entries, relevant Pleadings, the Verdict, the Judgment and the Notice of Appeal in the above entitled cause of action. The opinion of the United States Court of Appeals for the Seventh Circuit filed on November 30, 1971, appears in full in the Petition for Writ of Certiorari.

APPENDIX

(Caption No. 38)
DOCKET ENTRIES

4-10-69 Indictment filed. Praecipe for warrant filed. Warrants Iss. and given to Marshal.

4-19-69 Charles W. Grubb, P. O. Box 354, Cedar Lake, Indiana, enters appearance for defendants.

4-25-69 Defendant, Edward Joseph Misiolek, present in court with counsel, Charles Grubb. Defendant advised of his right to have trial by jury.
Defendant arraigned and plead NOT GUILTY to all counts.
Defendant requests time to file motion to indictment.
Request granted to May 13, 1969.

4-25-69 Defendant, Robert Ray Tumlin, present in court with counsel, Charles Grubb. Defendant advised of his right to have trial by jury. Defendant arraigned and plead NOT GUILTY to all Counts.

4-25-69 Defendant, Robert Ray Tumlin, requests time to file motion to indictment.

(contd.) Request granted to May 13, 1969.

4-25-69 Defendant, Alex Strosky, present in court with counsel, Charles Grubb.
Defendant advised of his right to have trial by jury.
Defendant arraigned and plead NOT GUILTY to all counts. Defendant requests time to file

1-14-70 Govt. appears by J. Frank Kimbrough, Asst. U. S. Atty. Deft. Roy Woodward appears in person and by counsel, Charles W. Grubb.
Hearing to determine the mental competency of deft., Roy Woodward.
Deft. presents evidence. Court finds that the deft. is not capable to understand the charge against him or cooperating in his defense and is incompetent to stand trial. Deft. is ordered discharged. Same ruling entered in 69 HCR 34, 69 HCR 38, and 69 HCR 41.

12-14-70 Pltf. files motion to dismiss as to deft Barnett. Order of dismissal entered thereon. (SE) Beamer:J. (copies to counsel)

12-15-70 Govt. appears by J. Frank Kimbrough, Asst, U. S. Atty; Terry Lord and Michael King (Special Atty. Dept. Justice)
Defendants Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky appear in person and by counsel, Charles Grubb. Defendants to withdraw their motion to suppress evidence. Motion granted. Defendants withdraw their motion to suppress evidence. Cause called for trial by jury. Jury in attendance called and sworn on voir dire. The following were examined, selected, accepted and sworn to try this cause: 1. Charles J. Campbell 2. Faye Solomon 3. M. F. Wood 4. Lawrence Kleine 5. Adeline L. Litavech 6. Joyce A. Kunde 7. James H. Cloyd 8. Howard H. Westerman 9. John Sudroff 10. Nancy A. Jones 11. Fred C. Whitton 12. Joseph M. O'Brien. Parties file stipulation that case may be tried by less than

motion to indictment. Request granted to May 13, 1969.

4-25-69 Defendant, Roy Woodward, present in court with counsel, Charles Grubb.
Defendant requests continuance. Cause continued to May 9, 1969.

5- 1-69 Defendants file Motion to Dismiss Indictment with proof of service thereon.

5- 1-69 Defendant, Roy Woodward, files Motion for Mental Examination of defendant Roy Woodward with proof of service thereon.

5- 2-69 Defendants file Brief in Support of Motion to Dismiss Indictment with proof of service thereon.

5-19-69 Asst. U. S. Atty., J. Frank Kimbrough, files memorandum in opposition to motion to dismiss. Cert. of service thereon. Card to Jim.

6-17-69 Defendants file Reply Memorandum on Motion to Dismiss with proof of service thereon.

6-19-69 Defendants file Additional Argument on Motion to Dismiss with proof of service thereon.

6-27-69 Government files Supplemental Memorandum in Opposition to Motion to Dismiss with certificate of service attached thereto.

12-29-69 Order entered: The defts. have filed a motion to dismiss the indictment.
The motion to dismiss is DENIED. (SE) Beamer:J. (copies to counsel).
Memorandum attached thereto.

12 jurors but not less than ten. Defendants move for separation of witnesses. Motion granted. Witnesses ordered separated. Government presents opening statement. Defendants waive presentation of opening statement and reserve right to present opening statement at the close of Governments evidence. Government presents evidence, concludes and rests. At the close of Governments evidence and in the absence of the jury defendants move for a directed verdict of acquittal. Arguments heard. Motion denied. Jury in attendance defendants present evidence but does not conclude. Cause continued for further trial to December 16, 1970, at 9:30 a.m.

12-16-70 Trial resumed. Defendant presents further evidence, concludes and rests. Government presents rebuttal evidence, concludes and rests. Both sides rest. At the conclusion of all of the evidence all defendants move for judgment of acquittal. Motion denied. Government presents closing argument. Defendants present closing argument. Government presents final argument. Court tenders instructions numbered 1-19 and gives all. No. 7 is given as modified. Government tenders instructions numbered 1-14 and Court gives all. Defendants tender instructions numbered 1-2 and Court refuses both. Court instructs the jury. Bailiff sworn.

11:45 a.m. Jury retires to commence deliberation.
U. S. Marshal authorized to provide meals for the jury.

2:45 p.m. **Jury returns into open court with the following verdicts:**

"We the Jury, find the defendant, Edward Joseph Misiolek, guilty as charged." signed Joseph M. O'Brien, Foreman.

"We the Jury, find the defendant, Robert Ray Tumlin, guilty as charged." signed Joseph M. O'Brien, Foreman.

"We, the Jury, find the defendant, Alex Strosky, guilty as charged." signed Joseph M. O'Brien, Foreman.

Defendants to remain at liberty pending presentence investigation.

1- 8-71 **Parties file stipulation for return of seized money. Card to Paul. Defendant, Edward Joseph Misiolek, present in court with counsel, Charles W. Grubb. Deft. sentenced: 2 yrs.; 6 mos. to be served—upon release from institution deft. placed on probation for period of 3 yrs. on Count 1. Same sentence as to Cts. 2, 4 and 5, to run concurrently. Execution of sentence stayed pending appeal. Defendant to be at liberty on bond heretofore filed pending appeal. Judgment and Commitment issued. (SE)**

1- 8-71 **Beamer: J. Defendant, Robert Ray Tumlin, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs., suspended and deft. placed on probation for 3 yrs. as to Count 1. Imposition of sentence withheld as to Counts 2, 3, 4 and 5. Execution of sentence stayed pending appeal. Defendant to be a liberty on bond heretofore filed pending appeal. Judgment and Order of Probation issued.**

DOCKET ENTRIES & INDICTMENT

1- 8-71 (SE) Beamer, J. Defendant, Alex Strosky, present in court with counsel, Charles W. Grubb. Defendant sentenced: 2 yrs.; 6 mos. to be served upon release from institution deft. placed on probation for 3 yrs. Imposition of sentence withheld as to Counts 2, 3, 4 and 5. Deft. placed on probation for 3 yrs. Execution of sentence stayed pending appeal. Deft. to remain at liberty on bond heretofore filed pending appeal. Judgment and Commitment issued.

1- 8-71 (SE) Beamer: J. Receipt filed re Stipulation for Return of Seized Money filed January 8, 1971.

1-15-71 Defts. Misiolek, Tumlin and Strosky file Notice of Appeal. Clerk's Certificate issued and sent to U.S. Court of Appeals. Appeal Due: Feb. 23, 1971.

[Title Omitted]

1 Filed April 10, 1969 (Caption No. 38)

INDICTMENT

COUNT I

The Grand Jury charges:

From on or about the 5th day of September, 1968, the exact date being to the Grand Jury unknown, and continuously thereafter up to and including the 29th day of October, 1968, in the Northern District of Indiana and elsewhere, Edward Joseph Misiolek, Robert Ray Tumlin, Alex Strosky, Joseph Barnett and Roy Woodward, the defendants, did unlawfully, knowingly and wilfully conspire, combine, confederate and agree together

and with divers other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, to wit: to use and cause to be used a facility in interstate commerce with the intent to promote, manage, establish, carry on and to facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and thereafter to perform acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity in violation of Title 18, United States Code, Section 2 and Section 1952 (a) (3), all in violation of Title 18, United States Code, Section 371.

The said conspiracy was to be accomplished in the following manner and by the following means:

(a) The defendants, Edward Joseph Misiolek and Alex Strosky, would manage and carry on a business enterprise for the purpose of horse race bookmaking in Hammond, Indiana.

(b) It was a further part of the said conspiracy that copies of the Illinois Sports News published by the Wabash Publishing Company, 906 South Wabash Avenue, Chicago, Illinois would be used in connection with the said horse race bookmaking.

(c) It was a further part of the said conspiracy that the Hammond News Agency, Hammond, Indiana, at the request of the defendants would order and subscribe to copies of the Illinois Sports News which would be delivered by the Chicago South Shore and South Bend Railroad from Chicago, Illinois.

(d) It was a further part of the said conspiracy that the defendants would make arrangements with other

co-conspirators to pick up and receive copies of the Illinois Sports News when the said copies would arrive on the Chicago South Shore and South Bend Railroad trains from Illinois at the South Shore Train Station at 4531 Hohman Avenue, Hammond, Indiana.

(e) It was a further part of said conspiracy that the porter at the Hammond, Indiana South Shore Train Station, would initially take and receive copies of the Illinois Sports News from the South Shore train conductor who arrived with the South Shore Train from Illinois and deliver the said copies to the defendant, Roy Woodward.

(f) It was a further part of the said conspiracy that Roy Woodward, the defendant, would pick up and receive copies of the Illinois Sports News at and in the vicinity of the Hammond, Indiana South Shore Train Station and would deliver the said copies to locations and places where horse race bookmaking would be carried on.

(g) It was a further part of the said conspiracy that Robert Ray Tumlin, defendant, would receive and accept horse bets and would use and allow to be used copies of the Illinois Sports News in connection with horse race bookmaking and to facilitate the carrying on of said conspiracy and bookmaking activity.

At the approximate times hereinafter mentioned, the defendants, Edward Joseph Misiolek, Robert Ray Tumlin, Alex Strosky, Joseph Barnett and Roy Woodward, named herein, committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered

Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

2. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

3. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

4. On the 5th day of September, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin and Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

5. On the 5th day of September, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

6. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

7. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Roy Woodward entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sport News.

8. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

9. On the 6th day of September, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin, and Alex Strosky entered the Four Aces Recreation.

10. On the 6th day of September, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

11. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

12. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

13. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

14. On the 22nd day of October, 1968, in the Northern District of Indiana, defendants, Joseph Barnett, Robert Ray Tumlin, Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111-112th Street, Hammond (Roby), Indiana.

15. On the 22nd day of October, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

16. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered a room in the South Shore Train Station, 4531 Hohman Avenue, Hammond, Indiana.

17. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Roy Woodward, entered Sanders Restaurant, 4538 Hohman Avenue, Hammond, Indiana, carrying copies of the Illinois Sports News.

18. On the 23rd day of October, 1968, in the Northern

District of Indiana, defendant, Joseph Barnett, picked up copies of the Illinois Sports News at Sanders Restaurant.

19. On the 23rd day of October, 1968, in the Northern District of Indiana, defendants, Robert Ray Tumlin, Joseph Barnett, Edward Joseph Misiolek and Alex Strosky were present at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

20. On the 23rd day of October, 1968, in the Northern District of Indiana, defendant, Robert Ray Tumlin, accepted a horse bet at the Four Aces Recreation, 1111 112th Street, Hammond (Roby), Indiana.

COUNT II

The Grand Jury further charges:

On or about the 5th day of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statute (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, manage-

ment, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

COUNT III

On or about the 6th of September, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Alex Strosky, Joseph Barnett and Robert Ray Tumlin, and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952(a)(3) and 2.

COUNT IV

On or about the 22nd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in inter-

state commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the Northern District of Indiana to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

COUNT V

The Grand Jury further charges:

On or about the 23rd day of October, 1968, at Hammond, State of Indiana, in the Northern District of Indiana, and within the jurisdiction of this Court, the defendants, Edward Joseph Misiolek, Joseph Barnett, Robert Ray Tumlin, Alex Strosky and Roy Woodward, did use and cause to be used a facility in interstate commerce, to wit: The Chicago South Shore and South Bend Railroad train operated between Chicago, State of Illinois and Hammond, State of Indiana, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, to wit: a business enterprise involving gambling, in violation of Burns Indiana Statutes (1956 Replacement), Sections 10-2304, 10-2307, 10-2311 and 10-2331, and the said defendants did thereafter perform and attempt to perform acts in the

Northern District of Indiana, to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the said unlawful activity, in violation of Title 18, United States Code, Sections 1952 (a) (3) and 2.

A True Bill
/s/ Frank A. Hollingshead
Foreman

/s/ Alfred W. Moellering
Alfred W. Moellering
United States Attorney

/s/ Robert A. Hickey
Robert A. Hickey
Special Attorney
U. S. Department of Justice

• • •

29 Filed May 1, 1969. (Caption No. 38)

MOTION TO DISMISS INDICTMENT

The defendants by counsel, Charles W. Grubb, respectfully move the Court for a dismissal of all counts of the indictment, in this proceeding, returned to this Court on April 10, 1969, and for a discharge of all defendants therein charged, on the ground that the allegations contained in each count thereof, if true, do not constitute a violation of any law of the United States as charged.

/s/ Charles W. Grubb
Charles W. Grubb,
Attorney for Defendants
P.O. Box 354
Cedar Lake, Indiana 46303
Tel. 374-7056

BRIEF IN SUPPORT
OF MOTION TO DISMISS

SERVICE OF COPY ON
UNITED STATES ATTORNEY

A true copy of the foregoing motion was served upon and delivered to the Office of the United States Attorney this 1st day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

30 Filed May 2, 1969. (Caption No. 38)

BRIEF IN SUPPORT OF MOTION
TO DISMISS INDICTMENT

The defendants stand charged with violating Sections 1952 (a) (3) and also Sections 2 and 371 of Title 18 of the United States Code. However, successful prosecution depends on Section 1952 and the entire Act of Congress relating thereto, including Section 1953 passed by Congress contemporaneously with Section 1952.

Defendants allegedly caused the use of an interstate facility, a railroad, to deliver the Illinois Sports News to Hammond, Indiana from Chicago, Illinois to facilitate the operation of an allegedly illegal activity in Indiana, horse race betting.

If the allegations are true, the defendants subscribed to the Illinois Sports News through an Indiana news distributor who caused the same to be shipped from Chicago to Hammond for sale to the defendants who allegedly used the same for the allegedly unlawful activity in Indiana.

The Illinois Sports News is a newspaper exempt from the operation of Section 1953 of Title 18. See Kelly vs Illinois Bell Telephone and Kelly vs UPI in (7th CCA) 325 Fed. Facts in 210 F. Supp. 456 2nd 148. See also

US vs Kelly (6th CCA 1964, Ky.) 328 Fed. 2nd 227.

A 1967 decision in US vs Arnold, (4th CCA Va.) 380 Fed. 2nd 366 involved these facts: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. Arnold was charged with violation of 1953 and 1952 in that order. The Court followed US vs Kelly, supra, 328 Fed. 2nd 227 and held that Football Forecasts was the same kind of newspaper and exempt from Section 1953. The Court said: "We hold Forecasts exempted by the statute.

"Hence, the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility' * * * to * * * promote * * * any unlawful activity, as contemplated by the contemporaneously enacted Section 1952. Judgment of acquittal must be entered on both counts."

We must construe Sections 1952 and 1953 in pari materia. They relate, not only to the same subject matter (the government having raised this in Section 1952) but the two sections were passed contemporaneously.

In the Arnold case, Arnold actually and directly caused two interstate facilities to be used—telephone and the mails. In the case at hand, the defendants only and indirectly caused the use of one interstate facility. The government here has stretched beyond imagination the concept of interstate facility use contemplated under the statutes. If the direct use of an interstate facility, the telephone in Arnold, is not banned, then certainly the indirect use of an interstate facility is not banned.

BRIEF IN SUPPORT OF MOTION TO DISMISS AND ORDER DENYING MOTION

This is not the use of an interstate facility intended under Section 1952.

It is respectfully submitted that an indictment charging violation of Section 1952 based upon the alleged facts is unsustained. If Illinois Sports News is not within the ban of Section 1953, then the use of a common carrier, however remotely used by defendants, is not the use of an interstate facility to promote any unlawful activity, as contemplated by the contemporaneously enacted Section 1952, Title 18 of the United States Code.

Accordingly, defendants request a dismissal of all counts of this indictment and that they be discharged.

/s/ Charles W. Grubb
Charles W. Grubb
Attorney for Defendants
P.O. Box 354, Cedar Lake, Ind. 46303

SERVICE OF COPY ON UNITED STATES ATTORNEY

A true copy of the foregoing brief was served upon and delivered to the Office of the United States Attorney this 2nd day of May, 1969.

United States Attorney
N D of Ind. Hammond Division
By: /s/ Dorothea Snyder

54 Filed December 29, 1969. (Caption No. 38)

ORDER (Caption No. 38)

The defendants have filed a motion to dismiss the indictment. The motion is Denied.

/s/ George N. Beamer
U.S. District Judge

Enter: December 29, 1969

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Alex Strosky, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

80 Filed December 16, 1970.

UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Robert Ray Tumlin, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

81 Filed December 16, 1970.

UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

We, the Jury, find the defendant, Edward Joseph Misiolek, guilty as charged.

/s/ Joseph M. O'Brien
Foreman

December 16, 1970.

• • •

85 UNITED STATES DISTRICT COURT
For The
Northern District of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971, came the attorney for the government and the defendant (Tumlin) appeared in person, and[1] by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of[2] not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a) (3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting as charged[3] in 5 Counts of Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

---

[1] Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty, and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

JUDGMENT

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that[4] the defendant is hereby sentenced to Two (2) Years imprisonment, sentence suspended and the defendant is placed on probation for a period of Three (3)Years as to Count 1. Imposition of sentence is withheld as to Counts 2, 3, 4 and 5.

Execution of sentence is stayed pending appeal.

It Is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It Is Further Ordered that the clerk deliver three certified copies of this judgment and order to the pro-

---

[4] If sentence is imposed but execution suspended, and probation ordered, enter here (1) sentence or sentences, specifying counts if any, (2) whether sentences are to run concurrently or consecutively, and if consecutively, when each term is to begin with reference to termination of preceding term or to any outstanding or unserved sentence, (3) whether defendant is to be further imprisoned until payment of fine or fines and costs, or until he is otherwise discharged provided by law, (4) the facts regarding the suspension of the sentence or sentences and (5) the period of probation.

If sentence is suspended and probation ordered, enter here the following: "The imposition of sentence is hereby suspended and the defendant is placed on probation for a period of years from this date."

bation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ George N. Beamer
United States District Judge.

/s/ Francis T. Grandys
Clerk.

• • •

90 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971 came the attorney for the government and the defendant (Strosky) appeared in person and by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952 (a) (3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting as charged in 5 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

JUDGMENT

Two (2) Years, 6 months to be served. The remaining 1-1/2 Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release as to Count 1.

It Is Adjudged that Imposition of sentence is withheld as to Counts 2, 3, 4 and 5.

Execution of sentence is stayed pending appeal.

Defendant to remain at liberty on bond previously filed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge
Attest: Francis T. Grandys, Clerk

/s/ Hildred Bolsega
Deputy Clerk

/s/ Francis T. Grandys
Clerk

A True Copy Certified this 12th day of January, 1971

/s/ Francis T. Grandy
Clerk

/s/ Marilyn [Illegible]
Deputy Clerk

91 UNITED STATES DISTRICT COURT
For The
Northern District Of Indiana
Hammond Division

• • (Caption—No. 69 H CR 38) • •

JUDGMENT

On this 8th day of January, 1971 came the attorney for the government and the defendant (Misiolek) appeared in person and by counsel, Charles W. Grubb

It Is Adjudged that the defendant upon his plea of not guilty, and a verdict of guilty has been convicted of the offense of

Title 18, Section 371—Conspiracy

Title 18, Section 1952(a)(3) and 2—Interstate Transportation in Aid of Racketeering and Aiding and Abetting

as charged in 4 Counts of Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Two (2) Years, 6 months to be served. The remaining 1½ Years is suspended and the defendant is placed on probation for a period of Three (3) Years to begin upon release, as to each of 4 Counts, to run concurrently.

Execution of sentence is stayed pending appeal.

Defendant to remain at liberty on bond previously filed.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ George N. Beamer
United States District Judge.
/s/ Francis T. Grandys
Clerk.

A True Copy:
Attest: Francis T. Grandys, Clerk
By /s/ Hildred Bolsega
Deputy Clerk.

(Seal)

A True Copy. Certified this 12th day of January, 1971.
(Signed) Francis T. Grandys
Clerk.
(By) Marilyn [Illegible]
Deputy Clerk.

88 Filed January 15, 1971.

(Caption No. 38) NOTICE OF APPEAL

Notice is hereby given that Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky, defendants above named, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the final judgment entered in this proceeding on the 8th day of January, 1971.

Dated: January 15, 1971

/s/ Charles W. Grubb
Charles W. Grubb
P.O. Box 354
Cedar Lake, Indiana 46303
Tel.: 219-374-7056
Attorney for Defendants

71-839

DEC 27 1971

E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

E COPY NO._____

PAUL. P. ERLENBAUGH, William H. Mitchell
John C. Hintz

ADRIAN J. WHITE, John C. Hintz
James Lloyd

FRANK J. KELLY

RAYMOND J. KULIK, Eddie Dobrowski

EDWARD JOSEPH MISIOLEK, Robert Ray
Tumlin, Alex Strosky

PETITIONERS

vs

UNITED STATES OF AMERICA

RESPONDENT

* * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

* * * * * *

Charles W. Grubb
Attorney for Petitioners
P.O. Box 354
Cedar Lake, Indiana 46303
Telephone 219-374-7056

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United States Code,
Title 18, Sec. 371
Title 18, Sec. 1952
Title 18 Sec. 1953

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled causes of action on November 30, 1971.

OPINION BELOW

The opinion of the Court of Appeals has not been reported, but is set forth following the end of this petition.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit were filed and entered on November 30, 1971. No petition for rehearing was filed. The jurisdiction of this Court is invoked under Title 28, United States Code, 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in not following the opinion of

the Court of Appeals for the Fourth Circuit in a 1967 case entitled U. S. vs Arnold, 380 Federal 2nd, 366, thus creating a conflict between the circuits.

2. Whether the Court of Appeals erred in its ruling respecting all cases excepting White, that Specific Intent means specific intent to commit a State crime.

3. Whether the Court of Appeals erred in its ruling in Kelly, Kulik and Misiolek that Conspiracy means conspiracy to violate the State law.

4. Whether the Court of Appeals erred in its ruling on a proffered instruction on "Alibi" in the Kelly case in conflict with U. S. vs Marcus, 1948, 3rd CCA, 166 Fed. 2nd. 497.

STATUTES INVOLVED

The statutes Petitioners were

convicted of violating are:

18 USC, Section 371

If two or more persons conspire to commit any offense against the United States, or to defraud the United States

18 USC, Section 1952

(a) Whoever * * * uses any facility in interstate or foreign commerce, * * * * with intent to

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined * * * * * *

(b) As used in this section "unlawful activity" means (1) any business enterprise involving

gambling * * * * offenses in violation of the laws of the State in which they are committed * * * (Added Pub. L,87-228, Sec.1 (a) September 13, 1961, 75-Stat. 498). Another statute in issue is Section 1953 of Title 18, USC which provides as follows:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any * * * * paper, writing, * * * used or to be used * * * in a bookmaking * * * shall be fined * * *.

(b) This section shall not apply to * * * * (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. (Added Pub.L, 87-218, Sec. 1, September 13, 1961, 75 Stat. 492)

STATEMENT OF THE CASES

All of the Petitioners were tried in the United States District Court for the Northern District of Indiana, Hammond, Indiana. Their convictions in five separate cases were appealed to the Court of Appeals for the Seventh Circuit which affirmed the convictions. The appeals were consolidated for oral argument and opinion.

Petitioners Erlenbaugh, Mitchell and Hintz were convicted on a jury trial under 18 U.S.C. 371 for conspiracy to violate 18 U.S.C. 1952 and Mitchell and Hintz were also convicted on two counts each of violations of 18 U.S.C. 1952. Erlenbaugh was sentenced to two years (six months to be served) followed by three years of probation. Mitchell and Hintz were given concurrent suspended sentences of two years with three years' probation. Erlenbaugh operated a horse race betting establishment in Indiana, using the Illinois Sports News, a publication

containing horse race information published in Chicago, Illinois and transported to Hammond, Indiana by the Chicago, South Bend and South Shore Railroad. Its consignee was the Hammond News Agency. Copies of the Illinois Sports News were picked up at the Hammond Station before being delivered to the Hammond News Agency and found their way to Erlenbaugh's horse race betting place.

Petitioners White, John C. Hintz and James Lloyd were convicted on a jury trial on two counts under 18 U.S.C 371 and 1952. White received concurren sentences of two years (six months to b served) and three years' probation; Hintz and Lloyd were given concurrent suspended sentences of two years and three years' probation. The facts in their case were substantially the same as in Erlenbaugh.

Petitioner Kelly was convicted in a jury trial on one count in violation of 18 U.S.C. 1952 and on one count of

conspiracy to violate 1952 in violation of 18 U.S.C. 371. He received concurrent sentences of two years (six months to be served) followed by three years of probation. The facts in Kelly were substantially the same as in Erlenbaugh.

Petitioners Kulik and Dobrowski were convicted of four counts and three counts respectively, on jury trial, of violating 18 U.S.C. 371 and 1952. Kulik received concurrent sentences of two years (six months to be served) followed by three years' probation. Dobrowski was given concurrent suspended sentences of two years with three years' probations. The facts in Kulik were substantially the same as in Erlenbaugh.

Petitioners Misiolek, Tumlin and Strosky were each convicted by a jury of four counts in violation of 18 U.S.C. 371 and 1952. Misiolek and Strosky were sentenced to concurrent terms of two years (six months to be served)

followed by three years' probation. Tumlin was given a concurrent suspended sentence of two years with three years' probation on one count. Imposition of sentence was withheld on three counts. The facts in Misiolek were substantially the same as in Erlenbaugh.

In each of the five cases Petitioners assigned as error the overruling of their motions to dismiss the indictments. Each motion to dismiss cited U.S. vs Arnold, supra.

In all appeals except White, error was assigned that the Court erred in refusing to instruct the jury that specific intent means to violate the Federal Law, Section 1952, rather than the violation of a State Law.

In Kelly, Kulik and Misiolek the court was asked to instruct the jury that Conspiracy means conspiracy to violate a Federal Law, Section 1952, rather than the State Law. The Court declined and this was assigned as error.

In Kelly the Court was requested to give an instruction on "alibi". The Court declined to give the proffered instruction and gave no instruction of its own, in conflict with U.S. vs Marcus, supra.

After the briefs were filed in the Court of Appeals this Court decided Rewis vs U.S., 1971, 91 Supreme Court Reporter 1056, 28 L. Ed 2nd 493. This case was discussed on oral argument, but the Court of Appeals failed to even mention it in its opinion.

REASONS FOR GRANTING THE WRIT

Each of the five cases involved the filing of a motion to dismiss the indictment citing U.S. vs Arnold. The matter was argued and the Court overruled each motion to dismiss. Arnold is on all squares with the cases now before this Court, except that in

Arnold Section 1953 of Title 18, U.S.C was also in issue under one count of the indictment. In Arnold the Court pointed out that a newspaper like Illinois Sports News was exempted from 1953 as a newspaper. The Court of Appeals for the 7th Circuit had previously ruled that the Illinois Sports News was exempted from the operation of 1953. See Kelly vs Illinois Bell Telephone Company, 325 Fed. 2nd 148. (1963)

Section 1953, while not in issue under the indictments in the cases at hand, was part of the same statute passed by Congress on the same day. 1953 and 1952 were passed together. 1953 is the next section following 1952. It could just as well have been a paragraph or sub-section of 1952. They are pari materia. The rule that statutes in pari materia should be construed together applies with particular force to statutes passed at

the same session of the legislative body, especially where they are passed or approved on the same day. See 82 C.J.S. Section 367 and McClure vs U.S. 1938, 9th CCA, 95 Fed. 2nd 744.

The facts in Arnold are briefly these: Arnold, operating in Virginia, ordered by interstate telephone, copies of "Football Forecasts" from a supplier in Texas and the same were shipped to him by the United States Mails to be used for gambling purposes. The Court said: "We hold Forecasts exempted by the statute. * * * Hence the evidence will not support the first count of the indictment (1953). It follows that the second count must likewise be found unsustained. If Forecasts is not within the ban of Section 1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility' * * *to* * *promote* * any unlawful activity, as contemplated by the contemporaneously enacted 1952.

Judgment of acquittal must be entered on both counts."

It is a fundamental rule in the construction of statutes that penal statutes must be strictly construed against the prosecution and in favor of the accused. This rule means that such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used. Sections 1952 and 1953 are not in conflict, only the treatment accorded these sections by the government is conflicting. Submitting for the moment that sections 1952 and 1953 are in conflict, it is the duty of the Court to harmonize them in an effort to give effect to each. If irreconcilably conflicting, which they are not, the last in point of time or order of position of arrangement is frequently held to prevail.

Even though not in issue, the Court cannot ignore the existence of

Section 1953. It is as much a part of the statute as 1952, and in order of reporting is 75 Stat. 492, whereas 1952 is 75 Stat. 498.

When the motions to dismiss were filed and before argument this Court had not as yet decided Rewis vs U.S., April 5, 1971, 28 L Ed 2nd 493, 91 S. Ct. Rep. 1056. However, this case was cited on oral argument before the Court of Appeals in a further effort to convince that Court that the alleged violation of 1952 was not the violation contemplated by Congress. In Rewis two Georgia residents who traveled to Florida to place bets and two gambling operators who were Florida residents and did not cross state lines in connection with their operation, were convicted of violating 1952. The Court of Appeals for the 5th Circuit reversed the convictions of the bettors on the ground that the Travel Act (1952) does not outlaw

crossing a state line for the purpose of placing a bet, but it affirmed the operators' convictions on the ground that they were responsible for their customers' interstate travel (418 Fed. 2nd 1218).

In an unanimous opinion this Court at page 496, 28 L Ed 2nd, said: * * we are* * * unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952 prohibits interstate travel with the intent to 'promote, manage, establish, carry on or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. Legislative history of the Act is limited, but does reveal that Section 1952 was aimed primarily at organized crime and, more specifically at persons who reside in one

State while operating or managing illegal activities located in another. In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies, * * * In short, neither statutory language nor legislative history supports such a broad ranging interpretation of Section 1952.

And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,* * *"

The legislative history of 1952 reveals that the statute was aimed at organized crime and more particularily at persons who reside in one state while operating in another. In the cases here before the Court, there was no allegation and never any evidence of an organized criminal activity being operated in Indiana. There was no allegation and no evidence that the operators lived in any other state or that their operations were directed from another state. The geographic origin of the Illinois Sports News was a matter of no interest to Petitioners, it was a matter of happenstance so far as they were concerned. The over-expansive treatment of the act as sought by the government in the case

before the Court is no different than we might expect if a prostitute from Indiana sells herself from a mobile home parked at a rest plaza on Interstate Highway 80, an interstate facility, in Indiana.

Petitioners contend that the Court of Appeals erred in not following Arnold and the overall reasoning in Rewis offered on oral argument, and that the judgment of the Court should be reversed.

The question of "specific intent" was presented in requests for instructions in all except the White case. In those cases Petitioners, except White, asked the Trial Court to instruct the jury that specific intent meant intent to violate a federal law. Petitioners presented this question to the Court of Appeals substantially as follows: "The defendants contend that specific intent requires the government to prove that the defendants knowingly did an act which the law forbids,

purposely intending to violate the law - the Federal Violation charged. The Manual on Jury Instructions - Criminal, prepared by this Court for guidance of trial judges in the Seventh Circuit, makes no exception. In Section 4.04, page 20, Specific Intent is defined as follows: 'Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law'. Defendant is, of course, cognizant of the decision of this Court in U.S. vs Bash, CA 7th, 1966, 379 Fed. 2nd 483 and will pursue this issue no further in this Court".

Since the Court of Appeals had already ruled on the question of specific intent as it applies to 1952, Counsel did not pursue it further but asked the Court to preserve the question for review. The Court did so in

its opinion. Since the question has not, to Counsel's knowledge, been before this Court under 1952, the Court is requested to consider the matter in the event review is granted.

Petitioners in Kelly, Kulik and Misiolek requested instructions respecting conspiracies. The instruction requested in each of these three cases was substantially that the Court instruct the jury that "A conspiracy is a combination of two or more persons to accomplish the violation of a Federal Law". It was necessary for the government to prove that the defendant tacitly came to a mutual understanding to accomplish an unlawful act, the violation of a Federal Law. The statute is clear, it begins: "If two or more persons conspire to commit any offense against the United States ,or to defraud the United States * * *. The statute says nothing about conspiracies to violate State Laws. It is the conspiracy to commit an offense against

the United States that is covered by the law. The Trial Court should have given such an instruction and the Court of Appeals erred in upholding the Trial Court. In Pereira vs U.S., 347 U.S. 1, 11, the Court distinguished between the proof required in conspiracies and that required in substantive crimes, saying: "It is settled law that the commission of a substantive offense and a conspiracy to commit are separate and distinct crimes * * *. Thus the charge of conspiracy requires proof not essential to the convictions on the substantive offenses - proof of an agreement to commit an offense against the United States". This Court is requested to review the opinion of the Court of Appeals respecting conspiracy instructions in 1952 cases if review is granted.

On the trial of Kelly the latter offered evidence of "alibi" and asked the Trial Court to give an instruction.

This was his defense of alibi. The proffered instruction was as follows: "The defendant has introduced evidence that he was not present at the time and place the overt act of September 5, 1968 was committed. This is known in law as the defense of 'Alibi'. Alibi is a legal and proper defense. The accused does not have the burden of establishing an alibi, but the government must establish every element of the crime beyond a reasonable doubt, including the defendant's presence at the time and place the overt act was allegedly committed by him. If after weighing the evidence in support of the alibi with all of the facts and circumstances in the case, the jury has a reasonable doubt that the prosecution has proven that defendant was present at the time and place the over act was committed, it should find the defendant not guilty".

If a defendant requests an instruction as to the burden of proof

of his alibi, an instruction must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi as well as all other phases of the case. See Federal Practice and Procedure (Wright) Section 491.

The leading case on this issue is U.S. vs Marcus, CA 3rd, 1948, 166 Fed. 2nd 497. Marcus, in a bribery prosecution under 18 U.S.C. 207, was convicted. On trial, he had requested an instruction as to the burden of proof on his alibi. The Court refused to give it. No other instruction on alibi was given by the Court. The conviction was reversed and the Court said:

> "By the weight of authority it is held that the instruction on the presumption of innocence of the accused, and of the necessity of fastening every necessary element of the crime charged upon the accused beyond a reasonable doubt, are not enough in cases involving the necessary presence of the

> accused at a particular time and place, when the accused produces testimony that he was elsewhere at the time. * * * *If the accused requests an instruction as to the burden of proof on his alibi, an instruction must be given so as to acquaint the jury with the law that the government's burden of proof covers the defense of alibi, as well as all other phases of the case.* * *The appellee claims otherwise * * *. He claims, however, that the proffered instruction unduly states details on the case, and for that reason the court was right in refusing to give it. We think it clearly states the situation, but even if it did not, since an instruction on the issue was requested, it was the Court's duty to itself compose and give a proper instruction on the subject".

The Trial Court having failed to give the instruction offered or any part thereof, and having failed to give any instruction on alibi, erred and the Court of Appeals in affirming the conviction of Kelly also erred in not following Marcus, thereby creating a conflict between the Circuits on this question.

CONCLUSION

Petitioners in all of the cases respectfully submit that the Court of Appeals was in error in not following the case of U.S. vs Arnold and failing to do so there is a conflict with the Court of Appeals for the 4th Circuit. The motions to dismiss filed in the Trial Court in each case relied on Arnold. Now, since the trials and since filing briefs on the appeals, Rewis was decided. Rewis sets the standard for prosecutions under 1952. They must be aimed at organized crime, interstate travel or use of an interstate facility within the confines of the statute, without expansive treatment, and, not aimed at purely local operations which amount to minor state offenses, thus transforming them into federal felonies. The Trial Court erred in overruling the motions to dismiss and the Court of Appeals was in error in affirming the rulings.

In the Kelly case there is conflict between the 7th and 3rd Circuits on the matter of alibi instructions. This Court is requested to review the matter to resolve the apparent conflict.

The matters of the instructions on specific intent raised in all cases except White, and, conspiracy raised in Kelly, Kulik and Misiolek have not been before this Court and this Court is requested to rule that Specific Intent under 1952 means intent to violate the Federal Law, and, that Conspiracy means to conspire to commit an offense against the United States.

Petitioners respectfully submit that a writ of certiorari should be granted and all of the questions raised should be reviewed and the decision of the Court of Appeals for the 7th Circuit reversed.

Respectfully submitted,

Charles W. Grubb

Charles W. Grubb,
Attorney for Petitioners

PROOF OF SERVICE OF COPIES OF
PETITION

I certify that on the 24th day of December, 1971, I personally placed in the United States Mail, with sufficient postage, a package containing three (3) copies of the foregoing petition properly addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530, as required by Rule 33 of the Supreme Court.

Charles W. Grubb
Attorney for Petitioners

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

Nos. 18761, 18762, 18764, 18765, 71-1140

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
PAUL P. ERLENBAUGH, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ADRIAN J. WHITE, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANK J. KELLY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
RAYMOND J. KULIK, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
EDWARD JOSEPH MISIOLEK, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 69-CR-35
No. 69-CR-37
No. 69-CR-36
No. 69-CR-41
No. 69-CR-38
George N. Beamer, *Judge.*

NOVEMBER 30, 1971

Before FAIRCHILD, PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These consolidated appeals challenge the validity of judgments of conviction entered upon jury verdicts which found the defendants guilty of conspiring to violate 18 U.S.C. §1952 contrary to 18 U.S.C. §371 and of substantive violations of 18 U.S.C. §1952.

The issue common to all five appeals is whether the use of a "scratch sheet," delivered by interstate railroad, in a bookmaking operation constitutes use of an interstate facility under §1952 of the Travel Act, in view of the fact that the scratch sheet is a "newspaper or similar publication" under §1953(b)(3), to which §1953(a), prohibiting the sending or carrying of bookmaking paraphernalia, does not apply. Some of the appeals also challenge (1) rulings on instructions on intent and specific intent, (2) refusal to give instructions on using or causing to use a railroad as an interstate facility, (3) refusal to give an instruction on burden of proof where the defense of alibi was relied upon, (4) refusal to give a requested instruction on conspiracy, and (5) sufficiency of the evidence.

I

In No. 18761, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz were convicted upon a jury trial under 18 U.S.C. §371 for conspiracy to violate 18 U.S.C. §1952, and Mitchell and Hintz were also convicted on two counts each of violations of 18 U.S.C. §1952. Erlenbaugh was sentenced to two years (six months to be served) followed by three years of probation. Mitchell and Hintz were given concurrent suspended sentences of two years with three years' probation.

During the period August 13 to October 29, 1968, the Illinois Sports News, a publication containing horse racing information and known as a scratch sheet, was published in Chicago, Illinois, daily except Sunday. On each publication day approximately 90 copies in a brown manila envelope were put on the 8:30 A.M. train of the Chicago, South Shore and South Bend Railroad at the Randolph Street station in Chicago for delivery to the Hammond, Indiana, station at 9:02 in the morning.

At ten o'clock every day George Frost, an employee of Hammond News Agency, went to the Hammond station

and picked up the brown envelope which at that time of day contained only 30 copies of the scratch sheet and two smaller envelopes with money. The Hammond News Agency was billed by and paid the Illinois Sports News for the 90 daily copies at 20 cents each and resold the copies for 35 cents each. Frost testified that a Ray Goodman was authorized to pick up 22 copies daily and to pay Hammond News Agency weekly for those copies. The money picked up by Frost each day was equal to the difference between 68 (90 less the 22 taken by Goodman) and 30 scratch sheets multiplied by 35 cents.

Frost then delivered the 30 remaining sheets to three customers, the Alexander Book Store (7 copies), Friendly Billiards (13 copies) and the balance to the Sibley Newsstand. Frost also delivered the money to the Sibley Newsstand and Sibley was billed by and paid the Hammond News Agency at 30 cents a copy for the number of sheets it received and for the number of sheets represented by the money it received.

A bookmaking operation was conducted by Erlenbaugh on the premises known as Paul's Smoke Shop at 103 State Street, Hammond. Customers entered the bookmaking enterprise through a rear door opened by a doorkeeper who peered out in response to a knock on the door. Erlenbaugh and Mitchell took bets there. On many days between August 13 and October 29, 1968, Hintz would arrive at the South Shore railroad station in Hammond at about 9:00 A.M. in a 1959 green Pontiac. When the train arrived, the conductor would hand the station porter two envelopes, one containing the Illinois Sports News and the other containing another scratch sheet. The porter took the envelopes to the baggage room where they were opened, usually by Roy Woodward. Hintz and two or three other persons gathered around and each one took a quantity of scratch sheets and departed. Hintz went directly to 103 State Street, where the sheets were immediately utilized by the betting customers. The information contained in the scratch sheets came out earlier each day and was more complete than the horse racing information contained in regular newspapers.

In No. 18762, upon a jury trial, Adrian J. White was convicted on four counts, John C. Hintz (the same defen-

dant as in No. 18761) on three counts and James Lloyd on two counts in violation of 18 U.S.C. §371 and §1952. White received concurrent sentences of two years (six months to be served) and three years' probation; Hintz and Lloyd were given concurrent suspended sentences of two years with three years' probation.

The facts proved in 18762 were similar to those in 18761, except that the bookmaking establishment was conducted by White on premises known as State Recreation located at 658 State Street, Hammond. White and Hintz took bets there. Hintz and sometimes Lloyd picked up the scratch sheets at the train station and delivered them to the bookmaking premises, where they were promptly used in the operation.

In No. 18764, upon a jury trial, Frank J. Kelly was convicted on one count in violation of 18 U.S.C. §1952 and on one count of conspiracy to violate §1952 in violation of 18 U.S.C. §371. He received concurrent sentences of two years (six months to be served) followed by three years of probation.

The facts proved in 18764 were similar to those in 18761, except that Kelly's bookmaking establishment was located at 519 Conkey Street, Hammond. Ray Goodman, who worked for Kelly, had agreed with George Frost of the Hammond News Agency that Goodman would pick up Kelly's copies of the Illinois Sports News directly at the Hammond station and deliver them to Kelly's establishment.

In No. 18765, upon a jury trial, Raymond J. Kulik was convicted on four counts and Eddie Dobrowski was convicted on three counts of violating 18 U.S.C. §371 and §1952. Kulik received concurrent sentences of two years (six months to be served) followed by three years' probation. Dobrowski was given concurrent suspended sentences of two years with three years' probation.

The facts proved in 18765 were similar to those in 18761, except that the bookkeeping operation was carried on at 4534 Hohman Avenue, Hammond, by Kulik. Kulik and Dobrowski took bets there. Ray Goodman delivered copies of the Illinois Sports News to 4534 Hohman Avenue.

In No. 71-1140, upon a jury trial, Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky were each convicted upon four counts in violation of 18 U.S.C. §371 and 1952. Misiolek and Strosky were sentenced to concurrent terms of two years (six months to be served) followed by three years' probation. Tumlin was given a concurrent suspended sentence of two years with three years' probation on one count; imposition of sentence was withheld on three counts.

The facts proved in 71-1140 were similar to those in 18761, except that the bookmaking establishment was conducted on premises known as the Four Aces Recreation Bar located on 112th Street, Hammond, where Tumlin took bets and where Misiolek and Strosky were observed. Roy Woodward daily picked up several copies of the Illinois Sports News at the Hammond railroad station. On several occasions during September and October, 1968, Woodward left some of the scratch sheets at Sander's Restaurant where one Joe Barnett picked them up and drove off in a Cadillac accompanied by Tumlin or Misiolek. They drove to the J & J Body Shop, parked the car and walked to the Four Aces, where the sheets were utilized in the betting operation.

In all five cases, evidence was introduced showing that the number of scratch sheets ordered by Hammond News Agency dropped off sharply after the five bookmaking operations were shut down shortly prior to the indictments.

II

The principal question urged by all defendants is whether, since Illinois Sports News is a newspaper, the shipping of this newspaper by means of an interstate carrier constitutes the use of an interstate facility sufficient to charge the defendants with violations of the Travel Act.

Section 1953(a) provides in part, "Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in intestate . . . commerce any . . . paraphernalia, . . . paper, [or] writing . . . used, or to be used . . . in . . . bookmaking . . . shall be fined . . . or imprisoned . . . or both."

Section 1953 (b) provides in part, "This section shall not apply to . . . (3) the carriage or transportation in interstate . . . commerce of any newspaper or similar publication."

In *United States* v. *Kelly*, 328 F.2d 227 (6th Cir. 1964), the court of appeals held that the Louisville Daily Sport News, which was published by the Kelly family (who also published the Illinois Sports News) and which was made up of material copied from the Illinois Sports News, came within the ambit of "any newspaper or similar publication" and was therefore exempt from the operation of §1953. The court held, therefore, that the Kellys were entitled to a directed verdict of acquittal. The same Kellys successfully enjoined the telephone company from terminating its services used by them in receiving and transmitting racing news to be published in the Illinois Sports News and their other publication in *Kelly* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). In granting and affirming the injunction, it was necessary for both courts to find that the activities of the Kellys did not violate 18 U.S.C. §§1952 or 1953. In its opinion, this court expressly found that "plaintiffs accept no bets or wagers either by wire communication facilities or otherwise."[1] 325 F.2d at 151.

In the five cases on appeal there is no charge that the defendants violated §1953, but rather that they violated §1952(a)(3), which provides in part, "Whoever . . . uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" shall be fined or imprisoned

[1] Persons who likewise accepted no bets or wagers but supplied odds quotations to bookmakers and gamblers were held to be "within the ambit" of 18 U.S.C. §1084(d), which requires the termination of telephone service used for interstate transmission of gambling information in violation of state law, where the transmission was "rapid," despite the provision of §1084(b) that "[n]othing in this section shall be construed to prevent the transmission in interstate . . . commerce of information for use in news reporting of sporting events or contests . . . ." *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 471 (N.D. Ill. 1962), 220 F. Supp. 621 (N.D. Ill. 1963) (three judge court), *aff'd*, 376 U.S. 782 (1964); *Angelini* v. *Bell Telephone Co.*, 418 F.2d 111 (7th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970).

or both.[2] There is no denial by any of the defendants that they were all engaged in a business enterprise involving bookmaking or gambling unlawful under Indiana law.[3]

The evidence in all the cases showed that the scratch sheets were picked up daily (except Sunday) at the Hammond railroad station as soon as the train arrived and were promptly taken to the gambling establishments where they were widely utilized by the patrons and the defendants in connection with the placing of bets. The evidence further showed that the racing information contained in the Illinois Sports News was available more rapidly and in more convenient fashion than similar information published in the daily newspapers.

In *United States* v. *Miller*, 379 F.2d 483 (7th Cir.) (1967), *cert. denied*, 389 U.S. 930 (1967), this court affirmed the convictions under 18 U.S.C. §1952 of three defendants who obtained baseball scores from a Western Union tickertape originating in Chicago, Illinois and posted them on a blackboard in Gary, Indiana in connection with the operation of a baseball gambling pool unlawful under Indiana law. Judge Cummings, after a painstaking analysis of the meaning of the words "uses any facility . . . to . . . facilitate . . ." said (pages 485, 486):

> "As proprietor and operator, respectively, of this business, the defendants were responsible for the installation and presence of the ticker on their premises. They wanted the ticker in their establishment so that the customers could check the scores. They provided blackboards so that scores obtained from the ticker could be posted. They knew that these scores would be of interest to their baseball pool customers. With defendants' knowledge and approval, their customers promoted the pool by posting the scores obtained

[2] The defendants were also charged and some convicted of conspiring to violate 18 U.S.C. §1952(a)(3) in violation of 18 U.S.C. §371. They were also charged and convicted under the aiding and abetting statute, 18 U.S.C. §2.

[3] The defendants were charged with violating Burns Indiana Statutes (1956 Replacement) Sections 10-2304, 10-2307, 10-2311 and 10-2331. Section 1952(b) provides in part, "As used in this section 'unlawful activity' means . . . any business enterprise involving gambling . . . offenses in violation of the laws of the State in which committed. . . ."

from the tickertape. These activities constituted a 'use' of an interstate facility by defendants.

• • •

"It is true that the baseball pool could have been operated without the ticker, but nevertheless the ticker was maintained to obtain results as quickly as possible for the gambling customers. Section 1952 does not require that the ticker be essential to the gambling operation; it need only 'facilitate' the carrying on of the illegal gambling. As used in this statute, 'facilitate' means 'to make easy or less difficult.' United States v. Barrow, 212 F.Supp. 837, 840 (E.D.Pa. 1962). The testimony of FBI Agents Cox and Hagan amply supports the jury's finding that defendants facilitated the carrying on of this gambling operation by keeping the ticker on their premises."

In each of the present cases, FBI agents testified in detail regarding the use of the scratch sheets by defendants and their patrons as a vital element in the bookmaking operation.

This court reached results similar to *Miller* in *United States* v. *Lookretis*, 422 F.2d 647 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970) (Western Union tickertape service, contracted for by defendants, furnished baseball scores which were then posted in connection with operation of a baseball pool), *United States* v. *Stonehouse*, No. 71-1298 (7th Cir., Nov. 2, 1971) (Western Union tickertape), and *United States* v. *Rizzo*, 418 F.2d 71 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970) (mailing of credit cards by defendants for use in unlawful prostitution).

Although the tickertape and credit cards were lawful in and of themselves, their "use" by state lawbreakers to "facilitate" the unlawful activity constituted the §1952 violation. Apparently the defendants here would seek to distinguish these cases for the reason that a "newspaper or similar publication" is expressly exempted from the operation of §1953. This issue was decided against the defendants in *United States* v. *Ross*, 374 F.2d 227 (6th Cir. 1967), *vacated on other grounds sub nom. Stone* v. *United States*, 390 U.S. 204 (1968), where the interstate devices were also scratch sheets, namely "Angel-Kaplan

Sports Publications" mailed from Chicago to Nashville, Tennessee. The court of appeals affirmed a §1952 conviction where the defendant "used this publication for his convenience in his business" of "booking bets and wagers on athletic games in season" (page 230). We have recently affirmed the conviction under §1952 of Angelini (the "Angel" of Angel-Kaplan), holding that "the evidence was sufficient to establish that Angelini made use of the mails to distribute the line to his out-of-state [gambling] customer. . . ." *United States* v. *Cerone*, Nos. 18551, 18555, 18622, 18635, Slip Opinion at 24 (7th Cir., Sept. 15, 1971). In that case, Angelini was shown to be part of the bookmaking operation as well as the publisher of the scratch sheet, contrary to the *Kelly* cases, *supra*, where the publishers did not themselves accept bets or wagers. Two district courts have also held that a conviction may be sustained under §1952 even though the interstate device is a scratch sheet exempt under §1953. *United States* v. *Azar*, 243 F. Supp. 345 (E.D. Mich. 1964) ("numbers" game tip sheet printed in Ohio and distributed in Michigan); *United States* v. *Kish*, 303 F. Supp. 1212 (N.D. Ind. 1969) (Illinois Sports News transmitted by train from Chicago to South Bend, Indiana).

The only case cited by the defendants is *United States* v. *Arnold*, 380 F.2d 366 (4th Cir. 1967), where the defendant at Roanoke, Virginia, telephoned to the publisher at Fort Worth, Texas, a subscription to "Football Forecasts," which were mailed weekly to the defendant, who copied the information onto football parlay cards distributed to persons interested in betting on the outcomes of games. The defendant was convicted under §§1952 and 1953. The court held Forecasts to be exempt under §1953 and, without any further discussion, held, "If Forecasts is not within the ban of §1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility'" under §1952. 380 F.2d at 368. In view of the contrary holdings we have discussed and the lack of any precedent or reasoning in the *Arnold* case, we find its bald conclusion to be a non sequitur and decline to follow it.

We conclude that a newspaper or similar publication exempt from the operation of §1953 may nevertheless be used as an interstate facility to facilitate the carrying on

of unlawful gambling activity under §1952. Consequently, the trial court in each of the five cases properly denied the defendants' motions to dismiss the indictments.

III

In four of the appeals (No. 18762 excepted) an issue is raised over the failure to give instructions that the crimes charged required proof of specific intent before the defendants could be convicted. As a corollary, it is also argued that the trial court erred in instructing the jury that the government must prove beyond a reasonable doubt that the defendants used or caused the use of a facility in interstate commerce with specific intent to further an enterprise involving gambling in violation of Indiana laws, but "the government is not required to prove that the defendants specifically intended to violate a federal law."

The same argument was made and rejected in the *Miller* case, 379 F.2d 483 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967), where Judge Cummings said (page 486):

> "[The defendants] insist that the jury should have been instructed that ignorance on their part that they were violating a Federal law was a relevant factor in determining whether they were guilty. In a well-reasoned opinion, the District Judge rejected this construction of Section 1952. We approve his conclusion that 'the use of a facility in interstate commerce is a necessary jurisdictional element of an offense under Title 18 U.S.C. §1952 but that no specific mental element or specific intent * * * need be shown with reference to such use' (258 F. Supp. at p. 812). Similarly, in Turf Center, Inc. v. United States, 325 F.2d 793, 797 (9th Cir. 1963), the District Court instructed the jury that Section 1952 only requires intent to violate State law, and the Ninth Circuit approved the instruction without also requiring an intent to violate the Federal law."

See also United States v. *Lookretis*, 422 F.2d 647, 651 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970).

We conclude that the trial court gave the correct instructions governing intent in each case.

IV

In appeal No. 18761, the defendants contend that the trial court erred in refusing to give an instruction that, since there was no evidence that the defendants used the railroad, the only question remaining for the jury to determine was whether the defendants caused its use. The defendants cite no authority to support such an instruction, nor do they give any cogent reason why the failure to give the instruction resulted in any prejudice to them.

The instructions given by the court stated in great detail the elements of the offense required to be proved by the government beyond a reasonable doubt, including the requirement that the defendants used or caused to be used a facility in interstate commerce.

Under the facts of this case the jury could have found that the defendants' daily pickup of the scratch sheets at the railroad station constituted using or causing to use[4] the facilities of the railroad; in either case the defendants would have been guilty. The defendants' proffered instruction was obviously erroneous since it did not appear as a matter of law or uncontroverted fact that the defendants did not "use" the facilities under these circumstances; singling out "causing to use" would have been improper.

V

In appeal No. 18764, the defendant urges as a ground for reversal the failure of the trial court to give an instruction on the burden of proof on his defense of alibi,[5]

[4] Each indictment charged the defendants with violation of 18 U.S.C. §2, as well as of §1952. Section 2 provides in part:

"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[5] Defendant's Requested Instruction No. 3:

"The defendant has introduced evidence that he was not present at the time and place the overt act of September 5, 1968 was committed. This is known in law as the defense of 'Alibi'. Alibi is a legal and proper defense. The accused does not have the burden of establishing an alibi, but the government must establish every element of the crime beyond a reasonable doubt, including the defendant's presence at the time and place the overt act was allegedly committed by him. If after weighing the evidence in support of the alibi with all the facts and circumstances in the case, the jury has a reasonable doubt that the prosecution has proven that defendant was present at the time and place the overt act was committed, it should find the defendant not guilty."

citing *United States* v. *Marcus*, 166 F.2d 497 (3rd Cir. 1948).

The defendant Frank Kelly's evidence relating to the alleged alibi included his own testimony that he and Raymond Goodman, who had been a bookmaker for 20 years, were partners in a bookmaking enterprise beginning in January, 1968; that the Illinois Sports News was bought by Goodman and used at the partnership establishment; that sometime during the middle of August, 1968, he made a "break" with Goodman and left the entire business to him without being compensated; that in the latter part of August he went to Las Vegas, Nevada, and stayed there the entire month of September; and that he moved permanently to Las Vegas on November 6, 1968. The government adduced the testimony of an FBI agent that Kelly was present in the gambling establishment and accepted a bet on September 5, 1968, one of the days set forth in the indictment. The agent identified Kelly sitting in the courtroom as the same man he had seen on September 5, 1968. A friend of Kelly and her nephew testified that Kelly was in Las Vegas with them from September 3 to about September 25, 1968. Both of these witnesses had been friends of Kelly for about 30 years.

Kelly admitted on cross examination that during the month of October he visited the gambling establishment to see how it was being run, to collect money owed to him by Goodman, and to collect money which his customers "owed to the establishment." Goodman repeatedly referred to Kelly as "the boss"; on September 5 he told the FBI agent "here comes the boss" as Kelly approached the establishment.

Where the evidence intended to establish an alibi is not strong, the failure to instruct the jury upon the burden of proof in regard to the alibi is not error if the jury is instructed that the government must establish every element of the crime beyond a reasonable doubt, which was done here. *Guthrie* v. *United States*, 207 F.2d 19, 24 (D.C. Cir. 1953); *United States* v. *Coduto*, 284 F.2d 464, 469 (7th Cir. 1960), *cert. denied*, 365 U.S. 881 (1961).

In the case of the ordinary crime, one of the elements to be proved is the presence of the criminal at the time

of the crime. Presence is not an element under §1952. Being the operator or proprietor of the betting establishment utilizing the interstate facility is sufficient to result in a conviction under §1952 regardless of presence at any particular time. *United States* v. *Miller*, 379 F.2d 483, 485, 487 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967). Here Kelly's own admissions showed that he was still the owner or co-owner of the business after the date of the crime.

VI

It is difficult to determine from the briefs filed by the defendants in Nos. 18764, 18765 and 71-1140 exactly what their contention is in regard to the instructions on conspiracy. In each case, the trial court gave a detailed conspiracy instruction.

Although the defendants' requested instruction in each case was considerably shorter than that given by the trial court, virtually every phrase in the requested instruction was also in the instruction given by the court with the exception that where the court used the word "law" the defendants used the words "federal law." For example, whereas the court instructed the jury that "[a] conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means," the defendants proffered "[a] conspiracy is a combination of two or more persons to accomplish the violation of a federal law."

As part of the court's instructions, the entire indictment in each case was read, showing each count to be based upon federal law; the pertinent parts of the specific federal laws involved, 18 U.S.C. §371, §1952 and §2, were read; the essential elements of the primary substantive federal law involved (§1952) were defined; and the instructions as a whole were clear and complete.

Apparently the defendants' strategy in seeking to have the conspiracy instruction unnecessarily repeat "federal law" several times was to cause the jury to confuse the conspiracy charge with their contention that under the substantive §1952 charges the government was required to prove their specific intent to violate a federal law, a contention which we have rejected in this opinion (III, *supra*).

We conclude that the conspiracy instructions given in Nos. 18764, 18765 and 71-1140 were proper and the trial court did not err in any of the cases in refusing to give the defendants proffered instructions on that subject.

VII

The final contention in all but one of the cases (No. 18764 excepted) is that the trial court erred in denying the defendants' motions for judgments of acquittal because there was "nothing to show that defendants caused the use of an interstate facility in furtherance of gambling."

As noted in II above, in *Miller* we held, "Section 1952 does not require that the ticker be essential to the gambling operation; it need only 'facilitate' the carrying on of the illegal activity" and "[w]ith defendants' knowledge and approval, their customers promoted the pool by posting the scores obtained from the tickertape," which activities constituted the use of an interstate facility by the defendants. 379 F.2d at 485, 486.

The defendants state that, when a motion for acquittal is made, the duty of the trial judge (and therefore the court of appeals on appeal) is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendants guilty beyond a reasonable doubt. *United States* v. *Thayer*, 209 F.2d 534 (7th Cir. 1954).

In each of these cases, the evidence of the widespread use of the Illinois Sports News by the betting patrons as well as by the defendants and their employees, the importance of the early arrival of the sheets in advance of the daily newspapers so that betting could begin, the drastic decrease in the number of sheets sent to Hammond by Illinois Sports News after the bookmaking operations were shut down, and the clandestine method by which each defendant obtained the sheets without directly subscribing to the publication by sending an emissary to the railroad station to extract copies and leave money, constituted substantial evidence upon which the jury could determine that the defendants caused the use of interstate facilities, well within the standards fixed in *Miller*.

The convictions in all five cases are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

USCA 3921—The Scheffer Press, Inc., Chicago, Illinois—11-30-71—200

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-839

PAUL P. ERLENBAUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This petition concerns five cases in the United States District Court for the Northern District of Indiana, in which petitioners were convicted on charges of substantive violations of the Travel Act (18 U.S.C. 1952) and conspiracy (18 U.S.C. 371) to violate that Act. The charges were based on the operation of various bookmaking establishments, all of which used an interstate facility (a railroad) to obtain copies of scratch sheets that facilitated the illegal enterprises. The cases were consolidated for

oral argument in the court of appeals, and that court affirmed as to all petitioners in a comprehensive opinion (Pet. App. 1-15).

The facts set forth and petitioner's contentions are fully answered in the opinion below, on which we principally rely. We note in addition that *Rewis* v. *United States*, 401 U.S. 808, relied on by petitioners (Pet. 14-16), is readily distinguishable from the instant case. In *Rewis*, the Court held that "Congress did not intend that the Travel Act should apply to criminal activity simply because that activity is at times patronized by persons from another State" (401 U.S. at 812). Here the evidence showed that there was a regular, intentional use of an interstate facility to obtain the scratch sheets, the prompt arrival of which was essential to the successful conduct of the bookmaking operation. (See, *e.g.*, Kelly Trial Transcript, pp. 99, 134; White Trial Transcript, pp. 134; Pet. App. 3-4.)

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1972.

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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-839

PAUL P. ERLENBAUGH, ET AL,
Petitioners,

-v.-

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF PETITIONERS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1
CERTIORARI GRANTED MARCH 6, 1972

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit was set forth in full in the Petition for Writ of Certiorari. The opinion had not been reported as of the April 24, 1972 advance sheet.

JURISDICTION

The jurisdiction of this Court was invoked under Title 18, U.S. Code, Section 1254 and on March 6, 1972, this Court granted the Petition for a Writ of Certiorari. This Court agreed to review one question presented.

QUESTION PRESENTED

The sole question presented is: "Whether the Court of Appeals erred in not following the opinion of the

Court of Appeals for the Fourth Circuit in a 1967 case entitled U.S. vs Arnold, 380 Fed. 2nd. 366, thus creating a conflict between the circuits".

STATUTES INVOLVED

18 U.S. Code, Section 1952

(a) Whoever * * * uses any facility in interstate or foreign commerce, * * * * * with intent to

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management , establishment, or carrying on of any unlawful activity, and thereafter performs or attempts to perform any of the acts * * * * * shall be fined * * * * *

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling * * * offe

STATEMENT OF THE CASE

All of the Petitioners were tried in the United States District Court for the Northern District of Indiana, Hammond, Indiana. Their convictions in five separate cases were appealed to the Court of Appeals for the Seventh Circuit which affirmed the convictions. The appeals were consolidated for oral argument and opinion.

Petitioners Erlenbaugh, Mitchell and Hintz were convicted on a jury trial under 18 U.S.C. 371 for conspiracy to violate 18 U.S.C. 1952 and Mitchell and Hintz were also convicted on two counts each of violations of 18 U.S.C. 1952 (A 22). Erlenbaugh was sentenced to two years (six months to be served) followed by three years of probation. Mitchell and Hintz were

of two years with three years' probation. (A 23) Erlenbaugh operated a horse race betting establishment in Indiana, using the Illinois Sports News, a publication containing horse race information published in Chicago, Illinois and transported to Hammond, Indiana by the Chicago, South Bend and South Shore Railroad. Its consignee was the Hammond News Agency. Copies of the Illinois Sports News were picked up at the Hammond Station before being delivered to the Hammond News Agency and found their way to Erlenbaugh's horse race betting place.

Petitioners White, John C. Hintz and James Lloyd were convicted on a jury trial on two counts under 18 U.S.C. 371 and 1952. (A 44) White received concurrent sentences of two years (six months to be served) and three years' probation; Hintz and

Lloyd were given concurrent suspended sentences of two years and three years' probation. (A 47) The facts in their case were substantially the same as in Erlenbaugh.

Petitioner Kelly was convicted in a jury trial on one count in violation of 18 U.S.C. 1952 and on one count of conspiracy to violate 1952 in violation of 18 U.S.C. 371. (A 64) He received concurrent sentences of two years (six months to be served) followed by three years of probation. (A 64) The facts in Kelly were substantially the same as in Erlenbaugh.

Petitioners Kulik and Dobrowski were convicted of four counts and three counts respectively, on jury trial, of violating 18 U.S.C. 371 and 1952. (A 80) Kulik received concurrent sentences of

two years (six months to be served) followed by three years' probation. Dobrowski was given concurrent suspended sentences of two years with three years' probations. (A 84) The facts in Kulik were substantially the same as in Erlenbaugh.

Petitioners Misiolek, Tumlin and Strosky were each convicted by a jury of four counts in violation of 18 U.S.C. 371 and 1952. (A 103) Misiolek and Strosky were sentenced to concurrent terms of two years (six months to be served) followed by three years' probation. Tumlin was given a concurrent suspended sentence of two years with three years' probation on one count. Imposition of sentence was withheld on three counts. (A 104) The facts in Misiolek were substantially the same as in Erlenbaugh.

In each of the five cases Petitioners assigned as error the over-ruling of their motions to dismiss the indictments. Each motion to dismiss cited U.S. vs Arnold, supra.

ARGUMENT

Each of the five cases involved the filing of a motion to dismiss the indictment citing U.S. vs Arnold. (Erlenbaugh, (A 11), White (A 40) Kelly (A 60), Kulik (A 76), Misiolek (A 99). The matter was argued and the Court over-ruled each motion to dismiss. (Erlenbaugh, (A 22), White (A 43), Kelly (A 64) Kulik (A 80), Misiolek (A 102). Arnold is on all squares with the cases now before this Court, except that in Arnold Section 1953 of Title 18, U.S.C was also in issue under one count of the indictment. In Arnold the Court

of a 'facility' * * *to* * *promote* * any unlawful activity, as contemplated by the contemporaneously enacted 1952. Judgment of acquittal must be entered on both counts."

It is a fundamental rule in the construction of statutes that penal statutes must be strictly construed against the prosecution and in favor of the accused. This rule means that such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used. Sections 1952 and 1953 are not in conflict, only the treatment accorded these sections by the government is conflicting. Submitting for the moment that sections 1952 and 1953 are in conflict, it is the duty of the Court to harmonize them in an effort

to give effect to each. If irreconcilably conflicting, which they are not, the last in point of time or order of position of arrangement is frequently held to prevail.

Even though not in issue, the Court cannot ignore the existence of Section 1953. It is as much a part of the statute as 1952, and in order of reporting is 75 Stat. 492, whereas 1952 is 75 Stat. 498.

When the motions to dismiss were filed and before argument this Court had not as yet decided Rewis vs U.S., April 5, 1971, 28 L Ed 2nd 493, 91 S. Ct. Rep. 1056. However, this case was cited on or argument before the Court of Appeals in a further effort to convice that Court that the alleged violation of 1952 was not the violation contemplated by Congress. In

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Rewis two Georgia residents who traveled to Florida to place bets and two gambling operators who were Florida residents and did not cross state lines in connection with their operation, were convicted of violating 1952. The Court of Appeals for the 5th Circuit reversed the convictions of the bettors on the ground that the Travel Act (1952) does not outlaw crossing a state line for the purpose of placing a bet, but it affirmed the operators' convictions on the ground that they were responsible for their customers' interstate travel (418 Fed. 2nd 1218).

In an unanimous opinion this Court at page 496, 28 L Ed 2nd, said: * * * we are* * * unable to conclude that conducting a gambling operation frequented by out-of-state bettors, by itself, violates the Act. Section 1952 prohibits interstate travel with the intent to

'promote, manage, establish, carry on or facilitate' certain kinds of illegal activity; and the ordinary meaning of this language suggests that the traveler's purpose must involve more than the desire to patronize the illegal activity. Legislative history of the Act is limited, but does reveal that Section 1952 was aimed primarily at organized crime and, more specifically at persons who reside in one State while operating or managing illegal activities located in another. In addition, we are struck by what Congress did not say. Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers.

In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could over-extend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies, * * * In short, neither statutory language nor legislative history supports such a broad ranging interpretation of Section 1952 . And even if this lack of support were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.* * *"

The legislative history of 1952 reveals that the statute was aimed at

in Indiana.

Petitioners contend that the Court of Appeals erred in not following Arnold and the overall reasoning in Rewis offered on oral argument, and that the judgment of the Court should be reversed.

Respectfully Submitted

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SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-839

PAUL P. ERLENBAUGH, ET AL,
Petitioners,

-v.-

THE UNITED STATES OF AMERICA,
Respondent.

OPINION OF COURT OF APPEALS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 27, 1971
CERTIORARI GRANTED MARCH 6, 1972

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In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971 — SEPTEMBER SESSION, 1971

Nos. 18761, 18762, 18764, 18765, 71-1140

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
PAUL P. ERLENBAUGH, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ADRIAN J. WHITE, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANK J. KELLY,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
RAYMOND J. KULIK, et al.,
Defendants-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
EDWARD JOSEPH MISIOLEK, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 69-CR-35
No. 69-CR-37
No. 69-CR-36
No. 69-CR-41
No. 69-CR-38
George N. Beamer, *Judge.*

NOVEMBER 30, 1971

Before FAIRCHILD, PELL and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* These consolidated appeals challenge the validity of judgments of conviction entered upon jury verdicts which found the defendants guilty of conspiring to violate 18 U.S.C. §1952 contrary to 18 U.S.C. §371 and of substantive violations of 18 U.S.C. §1952.

The issue common to all five appeals is whether the use of a "scratch sheet," delivered by interstate railroad, in a bookmaking operation constitutes use of an interstate facility under §1952 of the Travel Act, in view of the fact that the scratch sheet is a "newspaper or similar publication" under §1953(b)(3), to which §1953(a), prohibiting the sending or carrying of bookmaking paraphernalia, does not apply. Some of the appeals also challenge (1) rulings on instructions on intent and specific intent, (2) refusal to give instructions on using or causing to use a railroad as an interstate facility, (3) refusal to give an instruction on burden of proof where the defense of alibi was relied upon, (4) refusal to give a requested instruction on conspiracy, and (5) sufficiency of the evidence.

I

In No. 18761, Paul P. Erlenbaugh, William H. Mitchell and John C. Hintz were convicted upon a jury trial under 18 U.S.C. §371 for conspiracy to violate 18 U.S.C. §1952, and Mitchell and Hintz were also convicted on two counts each of violations of 18 U.S.C. §1952. Erlenbaugh was sentenced to two years (six months to be served) followed by three years of probation. Mitchell and Hintz were given concurrent suspended sentences of two years with three years' probation.

During the period August 13 to October 29, 1968, the Illinois Sports News, a publication containing horse racing information and known as a scratch sheet, was published in Chicago, Illinois, daily except Sunday. On each publication day approximately 90 copies in a brown manila envelope were put on the 8:30 A.M. train of the Chicago, South Shore and South Bend Railroad at the Randolph Street station in Chicago for delivery to the Hammond, Indiana, station at 9:02 in the morning.

At ten o'clock every day George Frost, an employee of Hammond News Agency, went to the Hammond station

and picked up the brown envelope which at that time of day contained only 30 copies of the scratch sheet and two smaller envelopes with money. The Hammond News Agency was billed by and paid the Illinois Sports News for the 90 daily copies at 20 cents each and resold the copies for 35 cents each. Frost testified that a Ray Goodman was authorized to pick up 22 copies daily and to pay Hammond News Agency weekly for those copies. The money picked up by Frost each day was equal to the difference between 68 (90 less the 22 taken by Goodman) and 30 scratch sheets multiplied by 35 cents.

Frost then delivered the 30 remaining sheets to three customers, the Alexander Book Store (7 copies), Friendly Billiards (13 copies) and the balance to the Sibley Newsstand. Frost also delivered the money to the Sibley Newsstand and Sibley was billed by and paid the Hammond News Agency at 30 cents a copy for the number of sheets it received and for the number of sheets represented by the money it received.

A bookmaking operation was conducted by Erlenbaugh on the premises known as Paul's Smoke Shop at 103 State Street, Hammond. Customers entered the bookmaking enterprise through a rear door opened by a doorkeeper who peered out in response to a knock on the door. Erlenbaugh and Mitchell took bets there. On many days between August 13 and October 29, 1968, Hintz would arrive at the South Shore railroad station in Hammond at about 9:00 A.M. in a 1959 green Pontiac. When the train arrived, the conductor would hand the station porter two envelopes, one containing the Illinois Sports News and the other containing another scratch sheet. The porter took the envelopes to the baggage room where they were opened, usually by Roy Woodward. Hintz and two or three other persons gathered around and each one took a quantity of scratch sheets and departed. Hintz went directly to 103 State Street, where the sheets were immediately utilized by the betting customers. The information contained in the scratch sheets came out earlier each day and was more complete than the horse racing information contained in regular newspapers.

In No. 18762, upon a jury trial, Adrian J. White was convicted on four counts, John C. Hintz (the same defen-

dant as in No. 18761) on three counts and James Lloyd on two counts in violation of 18 U.S.C. §371 and §1952. White received concurrent sentences of two years (six months to be served) and three years' probation; Hintz and Lloyd were given concurrent suspended sentences of two years with three years' probation.

The facts proved in 18762 were similar to those in 18761, except that the bookmaking establishment was conducted by White on premises known as State Recreation located at 658 State Street, Hammond. White and Hintz took bets there. Hintz and sometimes Lloyd picked up the scratch sheets at the train station and delivered them to the bookmaking premises, where they were promptly used in the operation.

In No. 18764, upon a jury trial, Frank J. Kelly was convicted on one count in violation of 18 U.S.C. §1952 and on one count of conspiracy to violate §1952 in violation of 18 U.S.C. §371. He received concurrent sentences of two years (six months to be served) followed by three years of probation.

The facts proved in 18764 were similar to those in 18761, except that Kelly's bookmaking establishment was located at 519 Conkey Street, Hammond. Ray Goodman, who worked for Kelly, had agreed with George Frost of the Hammond News Agency that Goodman would pick up Kelly's copies of the Illinois Sports News directly at the Hammond station and deliver them to Kelly's establishment.

In No. 18765, upon a jury trial, Raymond J. Kulik was convicted on four counts and Eddie Dobrowski was convicted on three counts of violating 18 U.S.C. §371 and §1952. Kulik received concurrent sentences of two years (six months to be served) followed by three years' probation. Dobrowski was given concurrent suspended sentences of two years with three years' probation.

The facts proved in 18765 were similar to those in 18761, except that the bookkeeping operation was carried on at 4534 Hohman Avenue, Hammond, by Kulik. Kulik and Dobrowski took bets there. Ray Goodman delivered copies of the Illinois Sports News to 4534 Hohman Avenue.

In No. 71-1140, upon a jury trial, Edward Joseph Misiolek, Robert Ray Tumlin and Alex Strosky were each convicted upon four counts in violation of 18 U.S.C. §371 and 1952. Misiolek and Strosky were sentenced to concurrent terms of two years (six months to be served) followed by three years' probation. Tumlin was given a concurrent suspended sentence of two years with three years' probation on one count; imposition of sentence was withheld on three counts.

The facts proved in 71-1140 were similar to those in 18761, except that the bookmaking establishment was conducted on premises known as the Four Aces Recreation Bar located on 112th Street, Hammond, where Tumlin took bets and where Misiolek and Strosky were observed. Roy Woodward daily picked up several copies of the Illinois Sports News at the Hammond railroad station. On several occasions during September and October, 1968, Woodward left some of the scratch sheets at Sander's Restaurant where one Joe Barnett picked them up and drove off in a Cadillac accompanied by Tumlin or Misiolek. They drove to the J & J Body Shop, parked the car and walked to the Four Aces, where the sheets were utilized in the betting operation.

In all five cases, evidence was introduced showing that the number of scratch sheets ordered by Hammond News Agency dropped off sharply after the five bookmaking operations were shut down shortly prior to the indictments.

II

The principal question urged by all defendants is whether, since Illinois Sports News is a newspaper, the shipping of this newspaper by means of an interstate carrier constitutes the use of an interstate facility sufficient to charge the defendants with violations of the Travel Act.

Section 1953(a) provides in part, "Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in intestate . . . commerce any . . . paraphernalia, . . . paper, [or] writing . . . used, or to be used . . . in . . . bookmaking . . . shall be fined . . . or imprisoned . . . or both."

Section 1953 (b) provides in part, "This section shall not apply to . . . (3) the carriage or transportation in interstate . . . commerce of any newspaper or similar publication."

In *United States* v. *Kelly*, 328 F.2d 227 (6th Cir. 1964), the court of appeals held that the Louisville Daily Sport News, which was published by the Kelly family (who also published the Illinois Sports News) and which was made up of material copied from the Illinois Sports News, came within the ambit of "any newspaper or similar publication" and was therefore exempt from the operation of §1953. The court held, therefore, that the Kellys were entitled to a directed verdict of acquittal. The same Kellys successfully enjoined the telephone company from terminating its services used by them in receiving and transmitting racing news to be published in the Illinois Sports News and their other publication in *Kelly* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 456 (N.D. Ill. 1962), *aff'd*, 325 F.2d 148 (7th Cir. 1963). In granting and affirming the injunction, it was necessary for both courts to find that the activities of the Kellys did not violate 18 U.S.C. §§1952 or 1953. In its opinion, this court expressly found that "plaintiffs accept no bets or wagers either by wire communication facilities or otherwise."[1] 325 F.2d at 151.

In the five cases on appeal there is no charge that the defendants violated §1953, but rather that they violated §1952(a)(3), which provides in part, "Whoever . . . uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity" shall be fined or imprisoned

[1] Persons who likewise accepted no bets or wagers but supplied odds quotations to bookmakers and gamblers were held to be "within the ambit" of 18 U.S.C. §1084(d), which requires the termination of telephone service used for interstate transmission of gambling information in violation of state law, where the transmission was "rapid," despite the provision of §1084(b) that "[n]othing in this section shall be construed to prevent the transmission in interstate . . . commerce of information for use in news reporting of sporting events or contests . . . ." *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F.Supp. 471 (N.D. Ill. 1962), 220 F. Supp. 621 (N.D. Ill. 1963) (three judge court), *aff'd*, 376 U.S. 782 (1964); *Angelini* v. *Bell Telephone Co.*, 418 F.2d 111 (7th Cir. 1969), *cert. denied*, 397 U.S. 1040 (1970).

or both.[2] There is no denial by any of the defendants that they were all engaged in a business enterprise involving bookmaking or gambling unlawful under Indiana law.[3]

The evidence in all the cases showed that the scratch sheets were picked up daily (except Sunday) at the Hammond railroad station as soon as the train arrived and were promptly taken to the gambling establishments where they were widely utilized by the patrons and the defendants in connection with the placing of bets. The evidence further showed that the racing information contained in the Illinois Sports News was available more rapidly and in more convenient fashion than similar information published in the daily newspapers.

In *United States* v. *Miller*, 379 F.2d 483 (7th Cir.) (1967), *cert. denied*, 389 U.S. 930 (1967), this court affirmed the convictions under 18 U.S.C. §1952 of three defendants who obtained baseball scores from a Western Union tickertape originating in Chicago, Illinois and posted them on a blackboard in Gary, Indiana in connection with the operation of a baseball gambling pool unlawful under Indiana law. Judge Cummings, after a painstaking analysis of the meaning of the words "uses any facility . . . to . . . facilitate . . ." said (pages 485, 486):

> "As proprietor and operator, respectively, of this business, the defendants were responsible for the installation and presence of the ticker on their premises. They wanted the ticker in their establishment so that the customers could check the scores. They provided blackboards so that scores obtained from the ticker could be posted. They knew that these scores would be of interest to their baseball pool customers. With defendants' knowledge and approval, their customers promoted the pool by posting the scores obtained

[2] The defendants were also charged and some convicted of conspiring to violate 18 U.S.C. §1952(a)(3) in violation of 18 U.S.C. §371. They were also charged and convicted under the aiding and abetting statute, 18 U.S.C. §2.

[3] The defendants were charged with violating Burns Indiana Statutes (1956 Replacement) Sections 10-2304, 10-2307, 10-2311 and 10-2331. Section 1952(b) provides in part, "As used in this section 'unlawful activity' means . . . any business enterprise involving gambling . . . offenses in violation of the laws of the State in which committed. . . ."

> from the tickertape. These activities constituted a 'use' of an interstate facility by defendants.
>
> • • •
>
> "It is true that the baseball pool could have been operated without the ticker, but nevertheless the ticker was maintained to obtain results as quickly as possible for the gambling customers. Section 1952 does not require that the ticker be essential to the gambling operation; it need only 'facilitate' the carrying on of the illegal gambling. As used in this statute, 'facilitate' means 'to make easy or less difficult.' United States v. Barrow, 212 F.Supp. 837, 840 (E.D.Pa. 1962). The testimony of FBI Agents Cox and Hagan amply supports the jury's finding that defendants facilitated the carrying on of this gambling operation by keeping the ticker on their premises."

In each of the present cases, FBI agents testified in detail regarding the use of the scratch sheets by defendants and their patrons as a vital element in the bookmaking operation.

This court reached results similar to *Miller* in *United States* v. *Lookretis*, 422 F.2d 647 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970) (Western Union tickertape service, contracted for by defendants, furnished baseball scores which were then posted in connection with operation of a baseball pool), *United States* v. *Stonehouse*, No. 71-1298 (7th Cir., Nov. 2, 1971) (Western Union tickertape), and *United States* v. *Rizzo*, 418 F.2d 71 (7th Cir. 1969), *cert. denied*, 397 U.S. 967 (1970) (mailing of credit cards by defendants for use in unlawful prostitution).

Although the tickertape and credit cards were lawful in and of themselves, their "use" by state lawbreakers to "facilitate" the unlawful activity constituted the §1952 violation. Apparently the defendants here would seek to distinguish these cases for the reason that a "newspaper or similar publication" is expressly exempted from the operation of §1953. This issue was decided against the defendants in *United States* v. *Ross*, 374 F.2d 227 (6th Cir. 1967), *vacated on other grounds sub nom. Stone* v. *United States*, 390 U.S. 204 (1968), where the interstate devices were also scratch sheets, namely "Angel-Kaplan

Sports Publications" mailed from Chicago to Nashville, Tennessee. The court of appeals affirmed a §1952 conviction where the defendant "used this publication for his convenience in his business" of "booking bets and wagers on athletic games in season" (page 230). We have recently affirmed the conviction under §1952 of Angelini (the "Angel" of Angel-Kaplan), holding that "the evidence was sufficient to establish that Angelini made use of the mails to distribute the line to his out-of-state [gambling] customer. . . ." *United States* v. *Cerone*, Nos. 18551, 18555, 18622, 18635, Slip Opinion at 24 (7th Cir., Sept. 15, 1971). In that case, Angelini was shown to be part of the bookmaking operation as well as the publisher of the scratch sheet, contrary to the *Kelly* cases, *supra*, where the publishers did not themselves accept bets or wagers. Two district courts have also held that a conviction may be sustained under §1952 even though the interstate device is a scratch sheet exempt under §1953. *United States* v. *Azar*, 243 F. Supp. 345 (E.D. Mich. 1964) ("numbers" game tip sheet printed in Ohio and distributed in Michigan); *United States* v. *Kish*, 303 F. Supp. 1212 (N.D. Ind. 1969) (Illinois Sports News transmitted by train from Chicago to South Bend, Indiana).

The only case cited by the defendants is *United States* v. *Arnold*, 380 F.2d 366 (4th Cir. 1967), where the defendant at Roanoke, Virginia, telephoned to the publisher at Fort Worth, Texas, a subscription to "Football Forecasts," which were mailed weekly to the defendant, who copied the information onto football parlay cards distributed to persons interested in betting on the outcomes of games. The defendant was convicted under §§1952 and 1953. The court held Forecasts to be exempt under §1953 and, without any further discussion, held, "If Forecasts is not within the ban of §1953, then the use of the telephone to order its transmittal through the mail is not the use of a 'facility'" under §1952. 380 F.2d at 368. In view of the contrary holdings we have discussed and the lack of any precedent or reasoning in the *Arnold* case, we find its bald conclusion to be a non sequitur and decline to follow it.

We conclude that a newspaper or similar publication exempt from the operation of §1953 may nevertheless be used as an interstate facility to facilitate the carrying on

of unlawful gambling activity under §1952. Consequently, the trial court in each of the five cases properly denied the defendants' motions to dismiss the indictments.

III

In four of the appeals (No. 18762 excepted) an issue is raised over the failure to give instructions that the crimes charged required proof of specific intent before the defendants could be convicted. As a corollary, it is also argued that the trial court erred in instructing the jury that the government must prove beyond a reasonable doubt that the defendants used or caused the use of a facility in interstate commerce with specific intent to further an enterprise involving gambling in violation of Indiana laws, but "the government is not required to prove that the defendants specifically intended to violate a federal law."

The same argument was made and rejected in the *Miller* case, 379 F.2d 483 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967), where Judge Cummings said (page 486):

> "[The defendants] insist that the jury should have been instructed that ignorance on their part that they were violating a Federal law was a relevant factor in determining whether they were guilty. In a well-reasoned opinion, the District Judge rejected this construction of Section 1952. We approve his conclusion that 'the use of a facility in interstate commerce is a necessary jurisdictional element of an offense under Title 18 U.S.C. §1952 but that no specific mental element or specific intent • • • need be shown with reference to such use' (258 F. Supp. at p. 812). Similarly, in Turf Center, Inc. v. United States, 325 F.2d 793, 797 (9th Cir. 1963), the District Court instructed the jury that Section 1952 only requires intent to violate State law, and the Ninth Circuit approved the instruction without also requiring an intent to violate the Federal law."

See also United States v. *Lookretis*, 422 F.2d 647, 651 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970).

We conclude that the trial court gave the correct instructions governing intent in each case.

IV

In appeal No. 18761, the defendants contend that the trial court erred in refusing to give an instruction that, since there was no evidence that the defendants used the railroad, the only question remaining for the jury to determine was whether the defendants caused its use. The defendants cite no authority to support such an instruction, nor do they give any cogent reason why the failure to give the instruction resulted in any prejudice to them.

The instructions given by the court stated in great detail the elements of the offense required to be proved by the government beyond a reasonable doubt, including the requirement that the defendants used or caused to be used a facility in interstate commerce.

Under the facts of this case the jury could have found that the defendants' daily pickup of the scratch sheets at the railroad station constituted using or causing to use[4] the facilities of the railroad; in either case the defendants would have been guilty. The defendants' proffered instruction was obviously erroneous since it did not appear as a matter of law or uncontroverted fact that the defendants did not "use" the facilities under these circumstances; singling out "causing to use" would have been improper.

V

In appeal No. 18764, the defendant urges as a ground for reversal the failure of the trial court to give an instruction on the burden of proof on his defense of alibi,[5]

---

[4] Each indictment charged the defendants with violation of 18 U.S.C. §2, as well as of §1952. Section 2 provides in part:
"Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[5] Defendant's Requested Instruction No. 3:
"The defendant has introduced evidence that he was not present at the time and place the overt act of September 5, 1968 was committed. This is known in law as the defense of 'Alibi'. Alibi is a legal and proper defense. The accused does not have the burden of establishing an alibi, but the government must establish every element of the crime beyond a reasonable doubt, including the defendant's presence at the time and place the overt act was allegedly committed by him. If after weighing the evidence in support of the alibi with all the facts and circumstances in the case, the jury has a reasonable doubt that the prosecution has proven that defendant was present at the time and place the overt act was committed, it should find the defendant not guilty."

citing *United States* v. *Marcus*, 166 F.2d 497 (3rd Cir. 1948).

The defendant Frank Kelly's evidence relating to the alleged alibi included his own testimony that he and Raymond Goodman, who had been a bookmaker for 20 years, were partners in a bookmaking enterprise beginning in January, 1968; that the Illinois Sports News was bought by Goodman and used at the partnership establishment; that sometime during the middle of August, 1968, he made a "break" with Goodman and left the entire business to him without being compensated; that in the latter part of August he went to Las Vegas, Nevada, and stayed there the entire month of September; and that he moved permanently to Las Vegas on November 6, 1968. The government adduced the testimony of an FBI agent that Kelly was present in the gambling establishment and accepted a bet on September 5, 1968, one of the days set forth in the indictment. The agent identified Kelly sitting in the courtroom as the same man he had seen on September 5, 1968. A friend of Kelly and her nephew testified that Kelly was in Las Vegas with them from September 3 to about September 25, 1968. Both of these witnesses had been friends of Kelly for about 30 years.

Kelly admitted on cross examination that during the month of October he visited the gambling establishment to see how it was being run, to collect money owed to him by Goodman, and to collect money which his customers "owed to the establishment." Goodman repeatedly referred to Kelly as "the boss"; on September 5 he told the FBI agent "here comes the boss" as Kelly approached the establishment.

Where the evidence intended to establish an alibi is not strong, the failure to instruct the jury upon the burden of proof in regard to the alibi is not error if the jury is instructed that the government must establish every element of the crime beyond a reasonable doubt, which was done here. *Guthrie* v. *United States*, 207 F.2d 19, 24 (D.C. Cir. 1953); *United States* v. *Coduto*, 284 F.2d 464, 469 (7th Cir. 1960), *cert. denied*, 365 U.S. 881 (1961).

In the case of the ordinary crime, one of the elements to be proved is the presence of the criminal at the time

of the crime. Presence is not an element under §1952. Being the operator or proprietor of the betting establishment utilizing the interstate facility is sufficient to result in a conviction under §1952 regardless of presence at any particular time. *United States* v. *Miller*, 379 F.2d 483, 485, 487 (7th Cir.), *cert. denied*, 389 U.S. 930 (1967). Here Kelly's own admissions showed that he was still the owner or co-owner of the business after the date of the crime.

VI

It is difficult to determine from the briefs filed by the defendants in Nos. 18764, 18765 and 71-1140 exactly what their contention is in regard to the instructions on conspiracy. In each case, the trial court gave a detailed conspiracy instruction.

Although the defendants' requested instruction in each case was considerably shorter than that given by the trial court, virtually every phrase in the requested instruction was also in the instruction given by the court with the exception that where the court used the word "law" the defendants used the words "federal law." For example, whereas the court instructed the jury that "[a] conspiracy is a combination of two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means," the defendants proffered "[a] conspiracy is a combination of two or more persons to accomplish the violation of a federal law."

As part of the court's instructions, the entire indictment in each case was read, showing each count to be based upon federal law; the pertinent parts of the specific federal laws involved, 18 U.S.C. §371, §1952 and §2, were read; the essential elements of the primary substantive federal law involved (§1952) were defined; and the instructions as a whole were clear and complete.

Apparently the defendants' strategy in seeking to have the conspiracy instruction unnecessarily repeat "federal law" several times was to cause the jury to confuse the conspiracy charge with their contention that under the substantive §1952 charges the government was required to prove their specific intent to violate a federal law, a contention which we have rejected in this opinion (III, *supra*).

We conclude that the conspiracy instructions given in Nos. 18764, 18765 and 71-1140 were proper and the trial court did not err in any of the cases in refusing to give the defendants proffered instructions on that subject.

VII

The final contention in all but one of the cases (No. 18764 excepted) is that the trial court erred in denying the defendants' motions for judgments of acquittal because there was "nothing to show that defendants caused the use of an interstate facility in furtherance of gambling."

As noted in II above, in *Miller* we held, "Section 1952 does not require that the ticker be essential to the gambling operation; it need only 'facilitate' the carrying on of the illegal activity" and "[w]ith defendants' knowledge and approval, their customers promoted the pool by posting the scores obtained from the tickertape," which activities constituted the use of an interstate facility by the defendants. 379 F.2d at 485, 486.

The defendants state that, when a motion for acquittal is made, the duty of the trial judge (and therefore the court of appeals on appeal) is to determine whether substantial evidence, taken in the light most favorable to the government, tends to show the defendants guilty beyond a reasonable doubt. *United States* v. *Thayer*, 209 F.2d 534 (7th Cir. 1954).

In each of these cases, the evidence of the widespread use of the Illinois Sports News by the betting patrons as well as by the defendants and their employees, the importance of the early arrival of the sheets in advance of the daily newspapers so that betting could begin, the drastic decrease in the number of sheets sent to Hammond by Illinois Sports News after the bookmaking operations were shut down, and the clandestine method by which each defendant obtained the sheets without directly subscribing to the publication by sending an emissary to the railroad station to extract copies and leave money, constituted substantial evidence upon which the jury could determine that the defendants caused the use of interstate facilities, well within the standards fixed in *Miller*.

The convictions in all five cases are affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-839

PAUL P. ERLENBAUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 452 F. 2d 967.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1971. A petition for a writ of certiorari was filed on December 27, 1971, and was granted on March 6, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This Court granted certiorari limited to the following question presented by the petition: "Whether the

Court of Appeals erred in not following the opinion of the Court of Appeals for the Fourth Circuit in a 1967 case entitled *United States* v. *Arnold,* 380 F. 2d 366, thus creating a conflict between the circuits."

The question, in more concrete form, is whether petitioners' use of an interstate railroad to transport scratch sheets for use in their illegal gambling operations violated 18 U.S.C. 1952.

STATUTES INVOLVED

18 U.S.C. 1952 provides in part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any lawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in sub-paragraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act) or prostitution offenses in violation of the laws of the State in which they are committed or of the

United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States. * * *

18 U.S.C. 1953 provides in part:

(a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.

(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication. * * *

18 U.S.C. 1084 provides in part:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communi-

cation which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.* * *

STATEMENT

After jury trials on five separate indictments in the United States District Court for the Northern District of Indiana, the petitioners were convicted for the use of facilities of interstate commerce to facilitate bookmaking operations illegal under state law, in violation of 18 U.S.C. 1952, and conspiracy to commit that offense, in violation of 18 U.S.C. 371. The court of appeals consolidated the cases and affirmed each of the convictions, 452 F. 2d 967 (C.A. 7).

The facts are essentially the same in all the cases. In each the interstate facility which petitioners caused to be used was the railroad, and the item transported was the *Illinois Sports News,* a "scratch sheet," which was shown to be significant to the daily conduct of petitioners' illegal gambling businesses. Since the pertinent facts in the five cases are identical, the facts of

only one case (Erlenbaugh) are set forth in detail, as illustrative.

The evidence at the Erlenbaugh trial showed that between August 13 and October 29, 1968, the Hammond News Agency, a newspaper distributor in Hammond, Indiana, ordered ninety copies daily of the *Illinois Sports News* from the publisher (Tr. 90, 98, 113–114). The *Illinois Sports News,* which is printed in Chicago six days each week and sells for 35¢ at retail, is a horse racing publication of the type known as a "scratch sheet" [1] (Tr. 91, 97–98, 101–102, 291). It features horse racing information more complete and current than that available in Chicago's regular daily newspapers (Tr. 103).

Every morning except Sundays during the period of the indictment a messenger from the publisher delivered a brown manila envelope containing about ninety copies of the *Illinois Sports News* to Randolph Station in Chicago, where a porter placed it on the 8:30 a.m. train of the Chicago, South Shore, and South Bend Railroad, which arrived in Hammond, Indiana, at 9:02 a.m. (Tr. 90–92). When the train reached Hammond, another porter took the envelope from the conductor and placed it in the baggage room of the Hammond station (Tr. 277).

George Frost, an employee of the Hammond News Agency, testified that when he arrived at the Ham-

[1] A "scratch" is a horse that is withdrawn from a race in which it is entered. Information concerning scratches is of great interest to bettors, since withdrawal of a good horse alters the odds in a race (Tr. 101).

mond station at 10:00 a.m. each morning to pick up the manila envelope it regularly contained only about thirty copies of the *Illinois Soprts News* as well as two small envelopes of money (Tr. 113–116, 138–139). Frost testified that one Ray Goodman was the only person specifically authorized by the Hammond News Agency to remove scratch sheets from the envelope before Frost came for it. Goodman took twenty-two copies each day and was billed for them weekly by the Hammond News Agency (Tr. 127, 132). The money in the two small envelopes which Frost found each morning totalled 35¢ (the retail price) times the number of scratch sheets missing, other than those taken by Goodman. (Tr. 125.)

Frost delivered the remaining 30 scratch sheets to three customers, who were billed for them by the Hammond News Agency: Alexander Book Store, Friendly Billiards and Sibley Newsstand. Frost also delivered the money in the two envelopes to the Sibley Newsstand, which was billed by the Hammond News Agency both for the scratch sheets it actually received and the copies represented by the money in the envelopes (Tr. 117–118, 128).

Petitioner Hintz was seen to arrive at the Hammond station shortly after 9:00 a.m. on many days. He would go to the baggage room, where he and other persons would take copies of the *Illinois Sports News* from the manila envelope which had just arrived on the train from Chicago (Tr. 272–281). Hintz then took scratch sheets to 103 State Street, in Hammond (Tr. 150–154).

Petitioner Erlenbaugh conducted a bookmaking operation at 103 State Street in an establishment known as Paul's Smoke Shop (Tr. 147). Bettors would take the scratch sheets as soon as they arrived and use them to make their gambles (Tr. 154). Erlenbaugh told federal agents, during their execution of a search warrant of the premises, that he had been making book in Hammond for thirty-five years and had three persons—including petitioner Mitchell—working for him (Tr. 186, 216).

It was shown that the number of copies of the *Illinois Sports News* ordered by the Hammond News Agency declined sharply after this and other bookmaking operations in Hammond were closed by law enforcement authorities (Tr. 121).

The four other cases differed only in the identity of the participants in the illegal gambling operation, the location of the betting parlor and the precise manner in which copies of the *Illinois Sports News* were picked up daily at the Hammond railroad station (See Pet. App. 3–5).

SUMMARY OF ARGUMENT

Section 1952 of Title 18 U.S.C., under which petitioners were convicted, forbids the use of any interstate facilities to promote or facilitate illegal gambling. If the interstate facility is used for that purpose, the statute is violated, regardless of the particular kind of item that is transported or sent. Petitioners contend that there is an implied exception in

Section 1952 when an interstate facility is used to transport newspapers in aid of illegal bookmaking operations, since 18 U.S.C. 1953, which prohibits the interstate transportation of enumerated items of gambling paraphernalia, explicitly excludes from coverage "any newspaper or similar publication." But this contention disregards the absence of any such exclusion in Section 1952 and the substantial legislative reasons for creating an exclusion in Section 1953 that are not applicable to Section 1952.

Section 1953 forbids the interstate transportation of gambling paraphernalia. Unlike Section 1952, while it contains no requirement that the transportation be done to promote an unlawful purpose, it avoids coverage of innocent activities through various exceptions to its list of gambling paraphernalia. Section 1952 has a different approach: it forbids the use of any facility of interstate commerce to promote any of several "unlawful activities," including illegal gambling. Since the scope of the statute is confined by its requirement of a criminal purpose, it contains no exceptions as to the kinds of items whose transportation may violate the section.

An examination of the case law and legislative history of Sections 1952 and 1953 further establishes what is evident from their language and respective purposes: that the exception created for newspapers under Section 1953 does not create an immunity under Section 1952 for those who cause scratch sheets to be transported interstate in aid of illegal gambling operations.

ARGUMENT

PETITIONERS' USE OF AN INTERSTATE RAILROAD TO TRANSPORT SCRATCH SHEETS FOR USE IN THEIR ILLEGAL GAMBLING OPERATIONS VIOLATED 18 U.S.C. 1952

Petitioners were charged here with violating, and conspiring to violate, 18 U.S.C. 1952, by causing the use of an interstate facility to obtain copies of the *Illinois Sports News* to promote their illegal gambling activities. Petitioners do not dispute that their gambling operations, which were illegal under Indiana law,[2] constituted "unlawful activity" as defined in Section 1952(b). Similarly it is clear that petitioner's arrangement for the prompt daily arrival of the *Illinois Sports News*—which was important to their businesses—caused the use of an interstate facility, *i.e.*, the railroad, and "promoted" those illegal activities within the meaning of Section 1952(a)(3). Petitioners' sole contention here (in view of this Court's limited grant of certiorari) is that, because the item obtained through an interstate facility was a "newspaper or similar publication" within 18 U.S.C. 1953(b)(3),[3] it follows that petitioners could not be convicted under Section 1952.

Sections 1952 and 1953 were enacted in 1961 as parts of Attorney General Kennedy's legislative program to combat organized crime. Section 1953 forbids inter-

[2] See Burns Indiana Statutes (1956 Replacement) Sections 10-2304, 2307, 2311, and 2331.

[3] The government concedes that the *Illinois Sports News* is a newspaper under 18 U.S.C. 1953(b)(3). See *United States* v. *Kelly*, 328 F. 2d 227, 236-237 (C.A. 6); *United States* v. *Kish*, 303 F. Supp. 1212, 1213 (N.D. Ind.); *United States* v. *Azar*, 243 F. Supp. 345, 346-347 (E.D. Mich.).

state transportation of gambling paraphernalia. It does not require an intent to promote, or subsequent acts in furtherance of, an illegal enterprise, and, unlike Section 1952, it contains various exemptions. Section 1953 exempts common carriers acting in the usual course of their business (1953(a)) and does not apply to transportation of gambling paraphernalia to be used in wagering which is legal under state law (1953 (b)(1) and (2)). In addition there is a specific exemption for "the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication" (1953(b)(3)). Since Section 1953 lists certain inherently suspect gambling items and forbids their interstate transportation, the exceptions are necessary to prevent the broad generic language of the statute from being read to make contraband items that might be used either innocently or in aid of illegal gambling, such as newspapers with extensive racing information.

Section 1952 is quite different in approach and scope. It makes it a federal offense to use any interstate facility—including the mails—or to travel in interstate commerce with intent to promote an "unlawful activity," if thereafter an act is peformed in furtherance of the unlawful activity (1952(a)). "Unlawful activity" is defined, *inter alia,* as any business enterprise illegal under state or federal law which involves gambling, narcotics, prostitution, or liquor on which the federal excise tax has not been paid (1952 (b)(1)). Since a criminal purpose is an essential element under Section 1952, it is not applicable to innocent activities, and the statute, therefore, contains no

exceptions as to kinds of facilities used, or items transported, such as are found in Section 1953.

Thus, Congress understandably excluded newspapers from its list of gambling paraphernalia whose interstate transportation it made illegal, but had no corresponding intent to exempt from the coverage of Section 1952 those persons who use an interstate facility to obtain a newspaper or any other thing innocent in itself in order to promote an illegal gambling business. In the later case it is the carrying on of the illegal business with the aid of interstate facilities, not the transportation of the thing, which is the gist of the criminal charge. This reading of the legislative purpose is manifested not only by the absence in Section 1952 of any exemption for newspapers corresponding to the exemption in Section 1953; it is also borne out by the legislative history of those enactments, to which we now turn.

A. THE LEGISLATIVE HISTORY OF SECTIONS 1952 AND 1953 SHOWS THAT THERE WAS NO INTENT TO EXEMPT FROM SECTION 1952 PERSONS WHO TRANSPORT "A NEWSPAPER" BY INTERSTATE FACILITIES TO PROMOTE UNLAWFUL ACTIVITIES.

1. Eighteen U.S.C. 1952 (S. 1653), as originally introduced in the Senate, proscribed only travel in interstate or foreign commerce to promote unlawful activities. The Attorney General testified before the Senate Judiciary Committee that the purpose of the bill was to aid local law enforcement officials by impeding the travel of persons engaged in certain illegal enterprises. See Hearings on S. 1653–1658 and S. 1665 before the Senate Judiciary Committee on the At-

torney General's Program to Curb Organized Crime and Racketeering, 87th Cong., 1st Sess. (1961), at 15–17. According to the Attorney General, the legislation was primarily designed to be of "material assistance to the States in combatting pernicious undertakings which cross State lines." S. Rep. No. 644, 87th Cong., 1st Sess. (1961), at 4. See *United States* v. *Nardello,* 393 U.S. 286, 290–292.

As passed by the Senate, 18 U.S.C. 1952 contained an amendment offered in committee by Senator Keating which greatly broadened the bill by making it a federal offense to use any facility in interstate or foreign commerce—including the mails—to promote the specified unlawful activities. See S. Rep. No. 644, *supra,* at 4. The substance of this Senate amendment was incorporated in the House version of the bill (see H. Rep. No. 966, 87th Cong., 1st Sess. (1961) at 1), which was recommended by a conference committee (see H. Rep. No. 1161, 87th Cong., 1st Sess. (1961) at 1) and enacted into law.

Chairman Eastland of the Senate Judiciary Committee, who introduced 18 U.S.C. 1952 (as well as 18 U.S.C. 1084 and 1953) on the recommendation of the Attorney General, summarized the objectives of the statute in remarks on the Senate floor, as follows (107 Cong. Rec. 13943):

> The bill is designed to bolster local law enforcement by denying interstate facilities to persons engaged in illegal gambling, liquor, narcotics, or prostitution business enterprises or extortion or bri-

> bery in violation of the laws of the State in which committed or of the United States. The committee has received testimony that the complex operations of today's organized criminal syndicates recognize no State boundary. S. 1653 is intended to disrupt the interstate operation of these criminal organizations by making it impossible for organized gambling and other illegal activities to operate on an interstate scale beyond the reach of local enforcement agencies.

See also H. Rep. No. 966, *supra*, at 3 for a similar analysis of the purposes of the legislation.

2. Unlike 18 U.S.C. 1952, which forbade interstate travel, or use of interstate facilities, for a variety of "unlawful activities," including gambling, 18 U.S.C. 1953 (S. 1657) focused more narrowly on gambling paraphernalia alone. Congressman Celler, who introduced H.R. 6571, the House version of S. 1657, explained the bill as follows (107 Cong. Rec. 16537):

> The primary purpose is to prevent the transportation in interstate commerce of wagering material. The purpose actually is to cutoff and shutoff gambling supplies, in reality to prevent these lotteries and kindred illegal diversions.

See also S. Rep. No. 589, 87th Cong. 1st Sess. (1961); 107 Cong. Rec. 13902–13903 (remarks of Senator Eastland).

As originally introduced in the Senate, 18 U.S.C. 1953 proscribed any knowing transportation of wagering paraphernalia in interstate or foreign commerce

and excepted only common carriers operating in the usual course of business. The exemptions for paraphernalia to be used in gambling which is legal under state law (1953(b)(1) and (2)) and for newspapers and similar publications (1953(b)(3)) were added by amendments adopted by the Senate Judiciary Committee. S. Rep. No. 589, *supra,* at 1.

The Senate Judiciary Committee report on Section 1953 included an explanation of the purpose of the amendment exempting newspapers (S. Rep. No. 589, *supra* at 2):

> The committee * * * felt that the bill, as introduced, might be so interpreted as to bring within its criminal penalties a person who carried a newspaper or other publication containing racing results or predictions. In order clearly to prevent such an interpretation the committee has excluded the carrying or transporting into interstate or foreign commerce of any newspaper or similar publication from the provisions of the bill.

Senator Keating, who proposed the newspaper amendment in committee, stated in explanation on the Senate floor (107 Cong. Rec. 13902):

> * * * the press will be interested in knowing that under the amendment which has been offered by the committee, anyone who carried a *New York Times* or *Washington Post* or any other newspaper under his arm will not be liable to prosecution as he might have been under the bill as originally introduced.

> As originally worded the bill could have been construed to prohibit the interstate transportation of any newspaper which contained information useful in the numbers game. The amendment which I proposed in committee expressly excludes "newspapers and similar publications." This makes it absolutely certain that the bill will not infringe in any manner on the freedom of the press guaranteed by the first amendment. * * *

3. The legislative history of these two sections reveals that Congress was invoking its commerce power in each to attack organized crime in different ways. Section 1952 was a broad attack on organized criminal activities, designed to deny such activities the use of any and all facilities of interstate commerce. The only limitations on its scope were (1) its requirement that the facility be used to promote an unlawful activity; (2) its definition of "unlawful activities"; and (3) its requirement that after the use of such facilities some overt act be made in furtherance of the unlawful activity.

Section 1953, on the other hand focused narrowly on one specific type of conduct related to interstate gambling operations, transporting wagering paraphernalia interstate. Because such conduct is so closely associated with illicit gambling, Congress declared it illegal *per se*; the enactment, unlike 18 U.S.C. 1952, contained no requirement of intent to promote an illicit enterprise. To preclude the possibility that the

broad prohibitions of Section 1953 might punish legitimate activities, Congress found it necessary to write various exemptions into the statute.[4]

The legislative history of Section 1953 shows that the exemption for newspapers and similar publications in subsection (b)(3) had two purposes: (1) to avoid punishing citizens who innocently transport publications containing wagering information; and (2) to bar any conflict with the right of periodicals to publish and circulate, as guaranteed by the First Amendment.

Neither purpose of the Section 1953(b)(3) newspaper exemption would be served by overturning petitioners' convictions under 18 U.S.C. 1952. Petitioners are persons who engaged in gambling enterprises in violation of state law—not the innocent citizens Congress desired to immunize from prosecution when they happen to transport wagering paraphernalia across state lines. Furthermore, the right of the *Illinois Sports News* to publish and circulate is not impaired by petitioners' convictions. Nor does the application generally of Section 1952 to the operators of illicit gambling businesses who use interstate facil-

[4] 18 U.S.C. 1084 is similarly structured. It focused on a specific type of conduct related to interstate gambling, the interstate transmission by wire of wagering information by persons in the betting business, and made it illegal *per se*, without requiring a showing of intent to promote an illegal activity. Like Section 1953, and for the same reasons, its language was limited by exceptions designed to prevent application of the statute to innocent activities: Section 1084 does not apply to information transmitted for use in news reports of sporting events or to wagering information transmitted for use in betting which is legal under state law (1084(b)).

ities to transport scratch sheets or other kinds of newpapers for their gambling enterprises infringe upon the First Amendment right of the newspaper to publish and circulate. Conviction of such persons under Section 1952 does not imply the illegality of the scratch sheet itself or that it may not be sent in interstate commerce. Legitimate subscribers to the publication—including the wagering public—are plainly not within the reach of 18 U.S.C. 1952 and are not prevented from purchasing or transporting the publications.

B. THE REASONED CASE LAW UNIFORMLY HOLDS THAT THE OTHERWISE INNOCENT USE OF INTERSTATE FACILITIES VIOLATES SECTION 1952, IF THAT USE PROMOTES AN UNLAWFUL ACTIVITY.

As we have shown, a principal purpose of Section 1952 is to assist local law enforcement by subjecting to federal prosecution persons who use interstate facilities to further certain enterprises that violate state law. The use of an interstate facility raises the likelihood that the scope of the criminal activity may preclude adequate policing by local authorities and provides a basis for federal jurisdiction; the gravamen of the offense remains the illicit activity itself. See *United States* v. *Miller,* 379 F. 2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930. It follows that use of the interstate facility need not in itself be illegal. See *United States* v. *Azar, supra,* 243 F. Supp. at 350.

In numerous cases brought under Section 1952 the use of the interstate facility has been innocuous in itself; the violation has arisen because that otherwise innocent use has promoted an activity illegal under state (or federal) law. For example, in *Menendez* v.

United States, 393 F. 2d 312 (C.A. 5), certiorari denied, 393 U.S. 1029, the defendant was convicted under Section 1952 of having used a facility of interstate commerce, the long distance telephone, to promote a lottery operated in violation of Florida law. The winning lottery number was based upon the combined liabilities of the 12 Federal Reserve Banks, a figure released by the Federal Reserve Bank of New York on Thursdays at 4:00 p.m. Every Thursday the defendant, from Florida, telephoned the Federal Reserve in New York and obtained the necessary figure. Defendant's weekly telephone call, harmless in itself, satisfied the jurisdictional requirement in Section 1952 and subjected him to federal prosecution for his gambling operation which violated state law. Similarly, the courts have upheld convictions under 18 U.S.C. 1952 involving such *per se* innocent acts as sending Western Union money orders,[5] receiving racing results on a Western Union ticker tape,[6] or depositing checks for collection[7]—when they were performed in furtherance of the unlawful activities specified in Section 1952 (b). In *United States* v. *Ross*, 374 F. 2d 227 (C.A. 6), vacated on other grounds, 390 U.S. 204, the court specifically held that causing sports newspapers to be mailed in furtherance of an illicit gambling operation violated Section 1952. 374 F. 2d at 230.

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[5] *United States* v. *Ruthstein*, 414 F. 2d 1079 (C.A. 7); *United States* v. *Wingo*, 394 F. 2d 484 (C.A. 6); *United States* v. *Hawthorne*, 356 F. 2d 740 (C.A. 4).

[6] *United States* v. *Miller*, *supra*.

[7] *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932; *United States* v. *Barnes*, 383 F. 2d 287 (C.A. 6).

The present cases cannot rationally be distinguished from the many cases where the otherwise innocent use of interstate facilities has been held to violate Section 1952, when that use has served an illicit purpose. Petitioners' use of an interstate railroad to transport the *Illinois Sports News* would have been lawful in ordinary circumstances; it violated Section 1952 only because the scratch sheets were intended by petitioners to further, and were subsequently used by them in, their illegal gambling operations. From the viewpoint of the proscription of Section 1952, the substance of the transaction would have been the same if, instead of receiving physical copies of the scratch sheets, petitioners had been telephoned the information daily by a cohort. Such a use of the interstate telephone lines would clearly violate Section 1952. See, *e.g., Menendez* v. *United States, supra.* Nor do the petitioners' convictions under Section 1952 in any way imply the illegality, or chill the publication, of the *Illinois Sports News,* any more than the defendant's conviction in *United States* v. *Miller, supra,* prohibited Western Union from broadcasting baseball scores on its tickertape.

We submit that *United States* v. *Arnold,* 380 F. 2d 366 (C.A. 4), relied on by petitioners, was wrongly decided. In *Arnold,* the defendant made an interstate telephone call to order *Football Forecasts,* a weekly publication which was subsequently sent to him through the mails and which he used in an illegal gambling operation. The indictment charged both that *Football Forecasts* was wagering paraphernalia which defendant caused to be sent in interstate com-

merce in violation of 18 U.S.C. 1953 and that his initial interstate telephone call to order the paper constituted use of a facility in interstate commerce with intent to promote his illicit bookmaking business in violation of 18 U.S.C. 1952. He was convicted under both counts. In a short *per curiam* opinion, the Fourth Circuit properly reversed the conviction under Section 1953 on the ground that, since *Football Forecasts* was a newspaper, its transportation was exempt under Section 1953(b)(3). 380 F. 2d at 367-368. Without any further discussion, however, the court also reversed the defendant's Section 1952 conviction, saying (380 F. 2d at 368):

> If Forecasts is not within the ban of § 1953, then the use of the telephone to order its transmittal through the mail is not the use of a "facility * * * to * * * promote * * * any unlawful activity", as contemplated by the contemporaneously enacted § 1952.

The Fourth Circuit in *Arnold* cited no authority for its holding and did not take note of the contrary ruling in *United States* v. *Ross,* 374 F. 2d 227 (C.A. 6), affirming a conviction under 18 U.S.C. 1952 in which the mailing of a sports newspaper was the basis for federal jurisdiction. Likewise, the *Arnold* court overlooked its own decision in *United States* v. *Hawthorne, supra,* 356 F. 2d 740 (C.A. 4), certiorari denied, 384 U.S. 908, which adopted the general rationale we urge here, that the use of an interstate facility under 18 U.S.C. 1952 need not itself involve any illegal act. The court of appeals below characterized the holding of *Arnold* as a "bald conclusion" and

a "non sequitur" and declined to follow it in light of the "lack of any precedent or reasoning" therein. 452 F. 2d at 973. Moreover, the charge in *Arnold* was based specifically on the placing of the telephone call, not on the use of the interstate facility in obtaining newspapers which were used in the illegal enterprise. Though we think the decision in *Arnold* was wrong, the issue there was a stage more remote from that presented here, which involves the interstate transportation of an item which was directly utilized in the gambling enterprise.

In our view the decision below was correct. It is the use to which the newspaper was put, not the contents or the carrying of the newspaper, which places the stamp of illegality on the conduct here. An innocent object may be the instrumentality of a crime when used in a wrongful way. It is that use which Section 1952 proscribes.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court of appeals below should be affirmed.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ERLENBAUGH ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71–839. Argued November 13, 1972—
Decided December 12, 1972

Causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of an illegal gambling business is a violation of 18 U. S. C. § 1952. The exception for "any newspaper or similar publication" contained in 18 U. S. C. § 1953, which prohibits the interstate shipment of certain gambling paraphernalia, was not intended to be read into § 1952. Pp. 4–10.

452 F. 2d 967, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except WHITE, J., who took no part in the decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–839

Paul P. Erlenbaugh et al., Petitioners, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[December 12, 1972]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The petitioners in this case attack their convictions under the Travel Act, 18 U. S. C. § 1952 (1970), which makes it unlawful to use a facility of interstate commerce in furtherance of certain criminal activity. Petitioners were tried in five separate trials.[1] The cases were consolidated for purposes of appeal since each raised

[1] Petitioners Erlenbaugh, Mitchell, and Hintz were tried together. Petitioner Erlenbaugh was convicted of conspiracy to violate § 1952. Petitioners Mitchell and Hintz were each convicted of two counts of violating § 1952 and of conspiracy to violate the section.

Petitioners White and Lloyd were tried together with petitioner Hintz in a second trial. Each was convicted of conspiracy to violate § 1952, and petitioner White was convicted of three counts, petitioner Hintz of two counts, and petitioner Lloyd of one count of violating § 1952.

Petitioner Kelly was tried alone and convicted of one count of violating § 1952 and of conspiracy to violate the section.

Petitioners Kulik and Dobrowski were tried together and convicted of conspiracy to violate § 1952 and of three counts and two counts, respectively, of violating the section.

Petitioners Misiolek, Tumlin, and Strosky were tried together, and convicted of conspiracy to violate § 1952. Petitioner Misiolek was also convicted of three counts of violating § 1952, while petitioners Tumlin and Strosky were convicted of four counts of violating the section.

the question whether causing a publication to be carried by a facility of interstate commerce with an intent to facilitate the operation of a gambling business illegal under state law violated § 1952. The Court of Appeals for the Seventh Circuit affirmed the convictions, finding no exception in § 1952 for the transmittal of publications. 452 F. 2d 967 (1971). We granted certiorari for the limited purpose of resolving the conflict between this decision and a previous ruling of the Court of Appeals for the Fourth Circuit.[2] 405 U. S. 973 (1972). For reasons stated below we affirm.

In all respects here relevant, the facts of the five cases are identical. Each involves the operation in Hammond, Indiana, of a bookmaking business. A publication known as the Illinois Sports News was important to the functioning of each bookmaking operation. The News, a publication of the type generally referred to as a "scratch sheet," [3] contains more complete and detailed horse racing information than is found in regular newspapers, and was used extensively by the customers of the five bookmaking operations in placing their bets. Because the News, which appears daily except Sunday, is published in Chicago, Illinois, it was necessary to make arrangements for prompt daily delivery from Chicago to Hammond and the bookmaking establishments. This was accomplished by causing copies of the News to be

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[2] In *United States* v. *Arnold*, 380 F. 2d 366, 368 (1967), the Fourth Circuit reversed a conviction under § 1952 because, in its view, "the use of the telephone to order . . . transmittal through the mail [of a sports publication intended to be used to facilitate the operation of a football betting pool] is not the use of a 'facility . . . to . . . promote . . . any unlawful activity', as contemplated by . . . § 1952." The Seventh Circuit in this case specifically declined to follow the decision in *Arnold*. See 452 F. 2d, at 973.

[3] A "scratch" is a horse that has been withdrawn from a race in which it was entered. The withdrawal of a good horse obviously affects the odds in a race, and is therefore of great interest to bettors.

placed on board an early morning train of the Chicago, South Shore, and South Bend Railroad in Chicago for delivery to the railroad station in Hammond, where copies were picked up for each of the bookmaking operations. In each case the petitioners assumed various roles in this scheme,[4] but the pattern of the scheme for securing the prompt daily delivery of the News was the same in all cases.

Section 1952 (a) subjects to criminal liability anyone who "uses any facility in interstate . . . commerce . . . with intent to . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of [these] acts . . . ." Unlawful activity includes "any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed . . . ." See 18 U. S. C. § 1952 (b).[5] For our limited purposes it is not open to dispute that in each case petitioners were involved in bookmaking businesses which violated Indiana law;[6] that the Illinois Sports News was important to the operation of those bookmaking businesses; that the scheme for delivery of the News—a scheme which involved the use of a facility of interstate commerce, the railroad—was intended to facilitate the operation of the bookmaking businesses; or that the requisite overt acts occurred following the use of the interstate facility. The only question here is whether these cases fall outside the ambit of § 1952 because the use of the interstate facility was to secure delivery of a news publication.[7]

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[4] The Court of Appeals described each operation and the respective roles of the petitioners in detail, see 452 F. 2d, at 969–970.

[5] See n. 19, *infra*.

[6] See Ind. Ann. Stat. §§ 10–2304, 10–2307, 10–2331 (1956).

[7] The question presented in this case is solely one of statutory construction. There is no issue here as to the constitutionality of § 1952.

The basis of petitioners' challenge to the legality of their convictions under § 1952—and of the conflict between the circuit courts of appeals—is to be found in 18 U. S. C. § 1953 (1970). Section 1953 (a) makes it unlawful for anyone, "except a common carrier in the usual course of its business, knowingly [to] carr[y] or [to send] in interstate . . . commerce any . . . paraphernalia, . . . paper, writing, or other device used, or to be used . . . in (a) bookmaking; or (b) wagering pools . . . ; or (c) in a numbers, policy, bolita, or similar game . . . ." The broad sweep of subsection (a) in terms of paraphernalia covered is limited to some extent by § 1953 (b)(3) which makes the section inapplicable to "the carriage or transportation in interstate . . . commerce of any newspaper or similar publication." [8]

Petitioners' argument starts from the premise that they could not have been prosecuted under § 1953 (a) because the Illinois Sports News falls within the newspaper exception contained in § 1953 (b)(3).[9] Petitioners recognize that § 1952 contains no express exception for

[8] Subsection (b) also makes the section inapplicable to:

"(1) parimutuel betting equipment, parimutuel tickets were legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State . . . ."

[9] Whether publications such as the "scratch sheet" here at issue are in fact within the "newspaper or similar publication" exception contained in § 1953 (b)(3) is a question which has arisen on a number of occasions in the lower courts. See *United States* v. *Kelly*, 328 F. 2d 227, 229–236 (CA6 1964); *United States* v. *Arnold*, 380 F. 2d 366, 368 (CA4 1967); *United States* v. *Kish*, 303 F. Supp. 1212 (ND Ind. 1969); *United States* v. *Azar*, 243 F. Supp. 345, 346–347 (ED Mich. 1964). The Government here concedes that the Illinois Sports News is within § 1953 (b)(3). See Brief for United States, at 9 n. 3.

newspapers comparable to § 1953 (b)(3), but contend that § 1952 and § 1953 are *in pari materia*—that is, pertain to the same subject—and, under settled principles of statutory construction, should therefore be construed "as if they were one law," *United States* v. *Freeman*, 44 U. S. (3 How.) 556, 564 (1845); see, *e. g.*, *United States* v. *Stewart*, 311 U. S. 60, 64 (1940); *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 44 (1939). Thus, petitioners would have us read the exception contained in § 1953 (b)(3) as applicable to not only § 1953 (a) but also § 1952 (a), thereby barring their prosecution under the latter as well as the former. This we cannot do.

The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. Thus, for example, a "later act can be . . . regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting," and "is therefore entitled to great weight in resolving ambiguities and doubts." *United States* v. *Stewart*, *supra*, at 64–65. See also, *e. g.*, *Hunter* v. *Erickson*, 393 U. S. 385, 388 (1969); *United States* v. *Freeman*, *supra*, at 565. The rule is but a logical extension of the principle that individual sections of a single statute should be constructed together,[10] for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject, cf. *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535, 541–552 (1954). Given this underlying assumption, the rule's application certainly makes the most sense when

[10] See, *e. g.*, *Clark* v. *Uebersee Finanz-Korporation, A. G.*, 332 U. S. 480, 488 (1947); *Markham* v. *Cabell*, 326 U. S. 404, 410–411 (1945); *Ex parte The Public National Bank*, 278 U. S. 101, 104 (1928).

the statutes were enacted by the same legislative body at the same time. Such was indeed the case here.[11] Yet petitioners would have us resort to the exception contained in § 1953 (b)(3) not simply to resolve any "ambiguities or doubts" in the language in § 1952 but to introduce an exception to the coverage of the latter where none is now apparent. This might be a sensible construction of the two statutes if they were intended to serve the same function, but plainly they were not.[12]

True, § 1952 and § 1953 were both parts of a comprehensive federal legislative effort[13] to assist local authorities in dealing with organized criminal activity which in many instances had assumed interstate proportions[14] and which in all cases was materially assisted

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[11] Section 1952 was added to Title 18 of the United States Code by the Act of Sept. 13, 1961, Pub. L. No. 87-228, § 1 (a), 75 Stat. 498, amended Act of July 7, 1965, Pub. L. No. 89-68, 79 Stat. 212; Act of Oct. 27, 1970, Pub. L. No. 91-513, Tit. II, § 701 (i)(2), 84 Stat. 1282. Section 1953 was added to Title 18 of the United States Code by Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492. Indeed, both statutes were a part of Attorney General Kennedy's legislative program to combat organized crime and racketeering, and were considered simultaneously by committees of the House and Senate. See Hearings on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter Senate Hearings); Hearings on H. R. 468, H. R. 1246, H. R. 3021, H. R. 3022, H. R. 3023, H. R. 3246, H. R. 5230, H. R. 6571, H. R. 6572, H. R. 6909, H. R. 7039, before the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter House Hearings).

[12] Cf. *Farmers Reservior & Irrigation Co.* v. *McComb*, 337 U. S. 755, 764 (1949); *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 87–88 (1934); *Atlantic Cleaners & Dryers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932).

[13] See n. 11, *supra*.

[14] Attorney General Kennedy, who recommended the legislation to Congress, testified before the Senate and House Committees that "the extent to which organized crime and racketeering have developed on an interstate basis convincingly [demonstrates] the need

in its operations by the availability of facilities of interstate commerce.[15] The two statutes, however, play different roles in achieving these broad, common goals.

Section 1953 has a narrow, specific function. It erects a substantial barrier[16] to the distribution of certain materials used in the conduct of various forms of illegal gambling.[17] By interdicting the flow of these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.[18]

Section 1952, by contrast, does not apply just to illegal gambling; rather, it is concerned with a broad

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for new Federal laws." Senate Hearings, at 10–11; see House Hearings, at 19–20. See also H. R. Rep. No. 966, 87th Cong., 1st Sess., 2–3 (1961) (§ 1952).

[15] Attorney General Kennedy observed before the Senate Committee that racketeers "use interstate commerce and interstate communications with impunity in the conduct of their unlawful activities. If we curtail their use of interstate communications and facilities, we could inflict a telling blow to their operations. We could cut them down to size." Senate Hearings, at 11. Previously, before the House Committee, the Attorney General had described the legislative package as "designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today." House Hearings, at 20. See also H. R. Rep. No. 966, 87th Cong., 1st Sess., 3 (1961) (§ 1952); H. R. Rep. No. 968, 87th Cong., 1st Sess., 2 (1961) (§ 1953).

[16] Only common carriers acting in the usual course of their business, plus those materials specified in § 1953 (b), see n. 8, *supra*, are excluded from the statute's prohibition.

[17] See also 18 U. S. C. § 1084 (1970).

[18] Representative Celler, who introduced the statute in the House, described its purposes as follows:

"The primary purpose is to prevent the transportation in interstate commerce of wagering material. The purpose actually is to cutoff and shutoff gambling supplies, in reality to prevent these lotteries and kindred illegal diversions." 107 Cong. Rec. 16537 (1961).

See also S. Rep. No. 589, 87th Cong., 1st Sess., 2 (1961); H. R. Rep. No. 968, 87th Cong., 1st Sess., 2 (1961).

spectrum of "unlawful activity," [19] illegal gambling businesses being only one. Moreover, the statute does not focus upon any particular materials, but upon the use of the facilities of interstate commerce with the intent of furthering an unlawful "business enterprise." It is, in short, an effort to deny individuals who act for such a criminal purpose access to the channels of commerce.[20] Thus, while § 1952 ultimately seeks, like § 1953, to inhibit organized criminal activity,[21] it takes a very

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[19] "As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances . . . or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

[20] "This bill will assist local law enforcement by denying interstate facilities to individuals engaged in illegal gambling, liquor, narcotics or prostitution business enterprises." H. R. Rep. No. 966, 87th Cong., 1st Sess., 3 (1961). See also 107 Cong. Rec. 13943 (1961) (remarks of Senator Eastland).

[21] In *Rewis* v. *United States*, 401 U. S. 808, 811 (1971), we observed that "§ 1952 was aimed primarily at organized crime and, more specifically, at persons who reside in one State while operating or managing illegal activities located in another." We, of course, adhere to this view of the statute for "Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which . . . relatively minor state offenses [would be transformed] into federal felonies." *Id.*, at 812. See also *United States* v. *Bass*, 404 U. S. 336, 349–350 (1971). Petitioners contend that there was no proof in these cases that they were involved in organized criminal activity and that such activity was being directed from another State. Given the limited nature of our grant of certiorari, it is not open to question here that the five illegal bookmaking businesses were elements of organized criminal activity of the type contemplated by § 1952—though we do note that the reach of the statute clearly was not *limited* to instances in which organized criminal activity in one State is managed from another State, see n. 15, *supra*.

different approach to doing so. To introduce into § 1952 an exception based upon the nature of the material transported in interstate commerce would carve a substantial slice from the intended coverage of the statute. This we will not do without an affirmative indication—which is lacking here—that Congress so intended.

Our conclusion here is bolstered by the fact that the reason for the newspaper exception to § 1953 is absent in the context of § 1952. The original version of § 1953 introduced in the Senate contained none of the exceptions set forth in subsection (b). It was quickly realized that the bill, as introduced, bore the potential for unreasonably broad application, since it would have imposed absolute criminal liability on anyone, except a common carrier, who "knowingly carries or sends in interstate . . . commerce" any gambling paraphernalia used in an illegal gambling business. Were "knowingly" construed as modifying only the phrase "sends or carries," [22] the statute might have been applied to a wholly innocent person who knowingly carried a newspaper in interstate commerce unaware that it contained racing information.[23] It was to avoid this problem that the newspaper exception was added to § 1953.[24] But § 1952 obviously poses no threat to innocent citizens. Its application is limited to those who act with an intent to further unlawful activity—as was clearly true of these

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[22] But cf. *United States* v. *Chase*, 372 F. 2d 453, 460 (CA4), cert. denied, 387 U. S. 907 (1967) ("[K]nowledge and intent to transmit gambling paraphernalia in interstate commerce are elements of the crime created by" § 1953).

[23] "The Committee . . . felt that the bill, as introduced, might be so interpreted as to bring within its criminal penalties a person who carried a newspaper or other publication containing racing results or predictions." S. Rep. No. 589, 87th Cong., 1st Sess., 2 (1961).

[24] See *ibid.*; H. R. Rep. No. 968, 87th Cong., 1st Sess., 3 (1961).

petitioners. There is, then, no reason for carrying the newspaper exception of § 1953 (b)(3) over to § 1952.

The judgment is

Affirmed.

MR. JUSTICE WHITE took no part in the decision of this case.